

3



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

VOL. II.]

[PART I.

REPORTS OF CASES
DECIDED
IN THE HIGH COURT
OF
GRIQUALAND.

REPORTED BY

P. M. LAURENCE, LL.D.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE;

AND

W. M. HOPLEY, B.A.,

ADVOCATE OF THE SUPREME COURT.

VOL. II.—PART I.

SEPTEMBER to DECEMBER, 1883.

CAPE TOWN:

J. C. JUTA & Co.

1885.

HIGH COURT OF GRIQUALAND.

SEPTEMBER TO DECEMBER, 1883 (*a*).

JAMES BUCHANAN [Judge President].

S. T. JONES [First Puisne Judge].

P. M. LAURENCE [Second Puisne Judge].

LEIGH HOSKYNs [Crown Prosecutor].

(*a*) JONES, J., was prevented by ill-health from sitting during the September and November terms.

TABLE OF CASES REPORTED.

	PAGE
Adamanta Diamond Mining Company, Limited, <i>vs.</i> Wege	172
Alliance Diamond Mining Company, Limited, <i>In re</i>	61
Ball <i>vs.</i> Keefer	27
Bank of Africa <i>vs.</i> Kimberley Mining Board and others	12
Bank of Africa <i>vs.</i> Kimberley Mining Board and Gem Diamond Mining Company, Limited	150
Cornwall, N.O., and others <i>vs.</i> Dreyfus and Company	166
De Beer's Mining Board <i>vs.</i> Liquidator of Birbeck Diamond Mining Company, Limited	30
Dell <i>vs.</i> Otto	53
Dewhurst <i>vs.</i> Mathew	183
Dreyfus and Company <i>vs.</i> Cornwall, N.O.	149
Dreyfus and Company <i>vs.</i> Rintel	125
Dymott <i>vs.</i> Pike	55
Goldschmidt and Company <i>vs.</i> Page	99
Harvey <i>vs.</i> Crawford	31
Hofmeyr <i>vs.</i> Kruger and Verster	8
Kerr, N.O., <i>vs.</i> Alderson	140
Kilgour <i>vs.</i> Lotz	14
Kimberley Share Exchange Company, Limited, <i>In re</i>	162
London and South African Exploration Company, Limited, <i>vs.</i> Crewell and Company	35
London and South African Exploration Company, Limited, <i>vs.</i> Dutoitspan Mining Board	154
London and South African Exploration Company, Limited, <i>vs.</i> Lotz	14
Mackie Dunn and Company <i>vs.</i> Tilley and others	77
Park <i>vs.</i> Bank of Africa	66
Preston and Dixon <i>vs.</i> Trustee of Biden	5
Pullinger <i>vs.</i> Harsant	111
Queen <i>vs.</i> Brown	189
— Jack	187
— Murtha	191
— Naiget	63
— Solomon	193
— Visser and Kok	190
— Williams	186
Reinach, <i>In re</i> estate of	134

	PAGE
Ross, Priest and Page <i>vs.</i> Saber Brothers	1
Saber Brothers, <i>In re.</i> —Miles <i>vs.</i> Deputy Sheriff and Cape of Good Hope Bank	17
Standard Diamond Mining Company, Limited, <i>In re</i>	169
Tarry and Company <i>vs.</i> South-west Diamond Mining Company, Limited	39
Thompson and Company <i>vs.</i> Gooderson	57
Trustees of Gates <i>vs.</i> Le Roux	122

INDEX.

	PAGE
ABANDONMENT OF CLAIMS—See Interdict (3)	154
1. ACT 20, 1856, §§ 33 and 50, and Sched. B, Rules 10, 28, 31, 33.— See Pleadings in Magistrate's Court	14
2. — § 42.—See Act 46, 1882	191
3. — § 48.—See Act 3, 1861	193
ACT 3, 1861, § 29.—Act 20, 1856, § 48.— <i>Preparatory examination.</i> — <i>Effect of remittal by Crown Prosecutor on new charge.</i> —Where a preparatory examination was taken on a charge of house- breaking with intent to commit an indecent assault, and the case was remitted by the Crown Prosecutor to be tried as one of malicious injury to property, and the prisoner was thereupon convicted by the Magistrate under the provisions of Act 3, 1861, § 29, upon the original depositions:— <i>Held</i> , on review, that the proceedings should be set aside, under Act 20, 1856, § 48, and the case remitted to the Magistrate to proceed as upon an ori- ginal charge of malicious injury to property. <i>Queen vs.</i> <i>Solomon</i>	193
ACT 23, 1861, §§ 2 and 5.—See Provisional Sentence (1)	12
ACT 17, 1867.— <i>Evidence.</i> —On a charge of stock-theft under Act 17 of 1867, a Magistrate cannot sentence to both imprisonment and lashes. Where a prisoner was charged under the Act, and was convicted of being an accessory, and eating some of the stolen meat, and there was no evidence that he was an acces- sory or that he knew the meat to be stolen, the Court quashed the conviction. <i>Queen vs. Visser and Kok</i>	190
1. ACT 12, 1868, § 8.— <i>Application for leave to sue Company in liquidation.</i> —Leave granted to a Mining Board, under Act 12, 1868, § 8, to sue the official liquidator of a Company for rates imposed on the Company's claims subsequent to the winding- up order. <i>De Beer's Mining Board vs. Liquidator of Birbeck Diamond Mining Company, Limited</i>	30
2. — See Joint-stock Company (1)	61
3. — § 3.—See Joint-stock Company (2)	162
4. — §§ 2-4.—See Winding-up Order	169
ACT 17, 1874, § 6, and Act 21, 1876, § 5.—See Proof of Previous Con- victions	186
ACT 39, 1877, § 13.—See Compulsory Sequestration	140
ACT 5, 1879, § 16.—See Jurisdiction of High Court	5
ACT 27, 1882, §§ 5 and 9.— <i>Ordinance</i> 24, 1874, G. W., § 4.— <i>Splitting charges.</i> —Where the accused has at the same time and place been guilty of swearing and shouting in a public place, and	

also of drunken and riotous behaviour, the charge should not be split up and separate offences laid, and cumulative sentences passed exceeding in the whole the jurisdiction of the Special Justice of the Peace before whom the accused was tried. <i>Queen vs. Brown</i>	189
ACT 46, 1882, §§ 1 and 11.— <i>Act</i> 20, 1856, § 42.— <i>Defamatory Libel</i> .—It is not competent for a Magistrate, on a case being remitted to him under the Libel Act, 1882, to impose a penalty beyond his ordinary jurisdiction. <i>Queen vs. Murtha</i>	191
ACT 19, 1882, §§ 78, 39, 65, 66.— <i>See Interdict</i> (3)	154
ACTION AGAINST INDIVIDUAL PARTNERS ON DEBT OF FIRM.— <i>See Provisional Sentence</i> (1)	12
ADOPTION BY PARTNERSHIP OF CONTRACT OF PREVIOUS OWNER OF BUSINESS.— <i>See Partnership</i>	77
AMENDMENT OF PLEADINGS.— <i>See Pleadings in Magistrate's Court</i>	14
ARCHITECT'S CERTIFICATE.— <i>See Pleading</i> (2)	66
ARREST.— <i>Peregrinus</i> .—Can the Court confirm a writ of arrest obtained by one <i>peregrinus</i> against another <i>peregrinus</i> upon a liability which arose beyond its jurisdiction? [<i>Not decided</i> .] <i>Dymott vs. Pike</i>	55
ASSIGNMENT.— <i>See Deed of Assignment</i>	31, 125
ASSOCIATION FOR THE PURPOSE OF FORMING A COMPANY.— <i>See Partnership</i>	77
ATTACHMENT BY JUDGMENT CREDITOR.— <i>See Insolvency</i> (1)	17
ATTORNEY AND CLIENT.— <i>Costs of Suit</i> .—An attorney, who has done the work for which he was engaged, may recover his fees directly from his client, notwithstanding that they were part of the costs in an action wherein the Court had ordered that the costs should be paid out of a certain fund. <i>Dewhurst vs. Mathew</i>	183
1. BANKRUPTCY ACT, 1869, § 74.— <i>Appointment of Receiver and Manager</i> .— <i>Effect of liquidation proceedings under English Act on colonial assets</i> .—Under § 74 of the English Bankruptcy Act, 1869 (32 and 33 Vict. c. 71) the Courts of this Colony having insolvency jurisdiction will act in aid of and be auxiliary to the London Bankruptcy Court; and, on an order and request of that Court seeking such aid, will recognise the appointment by the said Court of a receiver and manager of the business of a firm carrying on business in London and the Cape Colony. <i>Ross, Priest, and Page vs. Saber Brothers</i>	1
2. — <i>See Insolvency</i> (1)	17
BONA FIDE HOLDER FOR VALUE.— <i>See Provisional Sentence</i> (5)	53
BREACH OF CONDITIONS OF ASSIGNMENT DEED.— <i>See Provisional Sentence</i> (3)	31
BUILDING CONTRACT.— <i>See Pleading</i> (2)	66
CLAIM IN RECONVENTION.— <i>See Pleading</i> (2)	66
CLEAR RIGHT.— <i>See Interdict</i> (1)	35
COMPULSORY SEQUESTRATION.— <i>Ordinance</i> 6, 1843, §§ 4, 12, 17, 30. — <i>Act</i> 39, 1877, § 13.— <i>148th Rule of Court</i> .—An order having been made for the provisional sequestration of the estate of A.,	

the debtor, who had been personally served with the summons for final adjudication, objected on the return day that the requirements of the Insolvent Ordinance had not been complied with in that (1) the provisional order had not been inserted in the *Government Gazette* of the Colony, but only in the local *Gazette* for Griqualand West (2) although the debtor had been absent from the Colony for forty days previous to the order being made, copies of the summons had not been published in the *Gazette* and affixed at the Supreme Court (3) that the affidavit accompanying the petition did not put a value on certain securities held by the petitioning creditor (4) that the Deputy Sheriff's return upon which the petition was founded, and which stated that the only goods pointed out to him (the securities in question) were (with one exception, which he valued at a small amount, wholly inadequate to satisfy the judgment) of "no market value," did not disclose any act of insolvency (5) that the petitioning creditor held other securities for the same debt, which he ought to have valued and realised. *Held*, that all the objections must be overruled, and that, as the Sheriff's return shewed that the debtor possessed no sufficient disposable property to satisfy the judgment, final adjudication must be ordered; *Semble*, a debtor who intends to oppose final adjudication should, in addition to filing and serving affidavits, serve on the petitioning creditor a formal statement in writing, under the 148th Rule of Court, of all the facts he intends to dispute.

<i>Kerr, N.O., vs. Alderson</i>	140
CONDITIONS OF SALE AND VALUATION OF PROPERTY ATTACHED.—	
See Sheriff's Sale (2)	166
CONFLICT OF LAWS.—See Insolvency (1)	17
CONTRACT TO TAKE SHARES.—See Joint-stock Company (3) ..	172
1. COSTS.—See Malicious Arrest	111
2. ——— See Sheriff's Sale (2)	166
COSTS OF SUIT.—See Attorney and Client	183
COVENANT NOT TO SUE.—See Provisional Sentence (7)	125
CUSTOM OF BANKERS.—See Provisional Sentence (2)	27
DAMAGES.—See Malicious Arrest	111
1. DEED OF ASSIGNMENT.—See Provisional Sentence (3)	31
2. ——— See Provisional Sentence (7)	125
DEFAMATORY LIBEL.—See Act 46, 1882	191
DESCRIPTION OF DEFENDANT.—See Provisional Sentence (5) ..	53
DISCHARGE OF ENDORSER BY ELECTION TO CHARGE MAKER.—See	
Provisional Sentence (8)	150
DUTIES OF LIQUIDATORS.—See Joint-stock Company (1)	61
ENDORSEMENT.—See Provisional Sentence (6)	122
ENGLISH BANKRUPTCY ACT.—See Bankruptcy Act, 1869	1, 17
EVIDENCE.—See Act 17, 1867	190
EXCEPTION.—See Pleading (1)	8
FRAUD OF ENDORSER.—See Provisional Sentence (5)	53

	PAGE
GIVING OF TIME.—See Provisional Sentence (8)	150
HOLDER OF LICENCE.—See Ordinances 16, 1879, and 19, 1880, G.W.	63
HOLDING OUT AND GIVING CREDIT.—See Partnership	77
INCHOATE COMPANY.—See Partnership	77
1. INSOLVENCY.— <i>English Bankruptcy Act, 1869.—Liquidation by Arrangement.—Power of receiver under English liquidation.—Attachment by judgment creditor.—Conflict of Laws.</i> —S. Bros., merchants of London and Kimberley, presented a petition for liquidation by arrangement under the English Bankruptcy Act, 1869. M. was appointed receiver and manager of the business in liquidation by the London Court, and his appointment was subsequently recognised by the High Court, under sect. 74 of the Bankruptcy Act. After he had applied for, but before he had obtained such recognition, a local judgment creditor had obtained an attachment on the goods of S. Bros. An application by M. for an order removing the attachment was refused. <i>In re Saber Brothers: Miles vs. Deputy Sheriff and Cape of Good Hope Bank</i>	17
2. —— <i>Liquidation and contribution account.—Ordinance 6, 1843, §§ 8, 44, 100, 109, 111.</i> —The trustee of an insolvent estate, who had been arrested and detained in a foreign country on account of a claim connected with his administration of the estate, held not to be entitled, without special authorisation from the creditors, to charge the estate with damages sustained by him in consequence of such detention. An objection to an attorney's taxed bill of costs on the ground that certain vouchers had been produced and the Master's <i>allocatur</i> given in the absence of the attorney for opposing creditors, who had attended the taxation, disallowed. Where the property mortgaged to preferent creditors was insufficient to meet the costs of realisation, concurrent creditors are not liable <i>pro rata</i> on the contribution account, the disbursements incurred being chargeable, under sect. 8 of the Insolvent Ordinance, to the secured creditors alone. Objections to the rate of commission charged on a liquidation and contribution account, and to the sufficiency of the vouchers for certain items filed by the trustee, referred to the Master for report. <i>In re estate of Reinach</i>	134
1. INTERDICT.— <i>Clear right.—Irreparable damage.</i> —A certain piece of ground partially under water was let to a firm of miners as a depositing site, but, as was alleged, without any permission or liberty to use the water, the exclusive right to which had previously been let to other parties for washing operations. On an application for an <i>interim</i> interdict to restrain the lessees, pending an action to be brought by the lessor, from using the water on the land demised:— <i>Held</i> , that as the right of the applicant was not altogether clear, and there was not sufficient proof of irreparable damage, the application for an interdict must be refused. <i>London and South African Exploration Company, Limited, vs. Council and Company</i>	35

2. — Where the maker of a promissory note had pledged certain property as security for payment on demand of the amount of the note, and payment had been applied for but no steps had been taken to obtain judgment on the note, the Court, in the absence of clear proof that the pledgee would otherwise be remediless, refused to interdict the pledgor from parting with the goods. *Thompson and Company vs. Gooderson* 57
3. — *Slander of Title.—Mines situate on private lands.—Abandonment of Claims.—Powers of Mining Board.—Proclamations 71 of 1871 and 8 of 1880, and Ordinances 10 of 1874 and 15 of 1879, Griqualand West.—Act 19, 1883, §§ 78, 39, 65, 66.—Interdict granted on a well grounded apprehension of interference with proprietary rights. Under the local Ordinances and Proclamations can there be an abandonment by the proprietors of claims situate on private lands where there is no reservation of minerals in favour of the Crown? [Not decided.]* *Per* LAURENCE, J.:—The Secretary of a Mining Board is not *ex officio* the proper officer to give notices to the owners of abandoned claims under sect. 78 of Act 19, 1883. *London and South African Exploration Company, Limited, vs. Dutoitspan Mining Board* 154
- IRREGULAR SERVICE OF SUMMONS.—See Provisional Sentence (8) .. 150
- IRREGULARITIES BY DEPUTY SHERIFF.—See Sheriff's Sale (2) .. 166
- IRREPARABLE DAMAGE.—See Interdict (1) 35
- ISSUABLE PLEA.—See Pleading (2) 66
1. JOINT-STOCK COMPANY.—Act 12, 1868.—*Duties of liquidators.—Secured creditor.—Liquidation must be prompt. Re Alliance Diamond Mining Company, Limited* 61
2. — *Winding-up Petition.—Act 12, 1868, sect. 3, sub-sect. 1.—Secured judgment creditor.—354th Rule of Court.—Sittings of Court in vacation.—Where it was not shewn that the ordinary course of liquidation would not prejudice a secured judgment creditor who, before the presentation of the winding-up petition, had in execution of a judgment attached the property specially mortgaged to him and declared executable by the Court, a winding-up order was made but it was ordered that the property attached should not vest in the liquidator, and that the liquidation should proceed without prejudice to the execution sale. Under the 354th Rule of Court, promulgated by Government Notice No. 179 of 1883, one Judge of the High Court, sitting in vacation on a day appointed by the Court during the previous term, can exercise all the powers and jurisdiction of the Court. In re Kimberley Share Exchange Company, Limited* 162
3. — *Contract to take shares.—Prospectus.—Misrepresentations by Secretary.—Payment of application money.—Loss of time and acquiescence.—In an action by a Company on a contract to take shares, the defendant pleaded misrepresentations in the prospectus and verbal misrepresentations by the secretary of the Company. Held, on the facts, that no such misrepresentations had been proved as would entitle the defendant to be*

relieved from his contract. The prospectus having stated that all applications for shares must be accompanied by the first instalment of the purchase money, and it having been proved that in some instances applications had been received and shares allotted without such payment :—*Held*, that this was not such a misrepresentation as to entitle a shareholder, who had duly paid his application money, to the rescission of his contract. The application money having been paid by a cheque drawn in the defendant's favour, and endorsed by him, and which there were funds to meet both on the date of payment and for some time afterwards, but which was ultimately dishonoured owing to the failure of the plaintiffs to present it timeously :—*Held*, that the defendant could not be compelled to make good the loss of this amount, which was occasioned by the negligence of the plaintiffs. The alleged misrepresentations on which the defendant relied having been brought to his notice shortly after the contract to take shares was made, and he having taken no steps in the matter till two years afterwards, when he had been sued on the contract : *Seemle*, that even if the misrepresentations had originally furnished a good ground of defence, the defendant would have been estopped from raising it by the presumption of acquiescence arising from lapse of time. *Adamanta Diamond Mining Company, Limited, vs. Wege* 172

4. — See Winding-up Order 169

1. JUDGMENT CREDITOR, ATTACHMENT BY.—See Insolvency (1) .. 17

2. — See Sheriff's Sale (1) 149

JURISDICTION OF HIGH COURT IN RESPECT OF JUDGMENT OF COURT OF APPEAL.—*Act 5, 1879, § 16.*—*Liability for arrear licences on claims.*—*Effect of order to transfer.*—The High Court has jurisdiction to enforce a judgment of the Court of Appeal reversing the judgment of the High Court. It having been decided that certain claims registered in the name of the defendant were the property of the plaintiffs and the defendant having been ordered to give the plaintiffs transfer of the same :—*Held*, that the defendant was not compelled by reason of this order to pay certain arrear licence money due from the owners of the claims and payable by them, and without payment of which transfer could not be effected in the office of the Registrar of Claims. *Preston and Dixon vs. Trustee of Biden* .. 5

LAPSE OF TIME AND ACQUIESCENCE.—See Joint-stock Company (3) 172

LEAVE TO SUE COMPANY IN LIQUIDATION.—See Act 12, 1868 (1) 30

LIABILITY FOR ARREAR LICENCES ON CLAIMS.—See Jurisdiction of High Court 5

— FOR GOODS SUPPLIED TO INCHOATE COMPANY.—See Partnership 77

— OF ENDORSER.—See Provisional Sentence (2) 27

LIQUIDATION AND CONTRIBUTION ACCOUNT.—See Insolvency (2) .. 134

LIQUIDATION BY ARRANGEMENT.—See Insolvency (1) 17

— MUST BE PROMPT.—See Joint-stock Company (1) 61

— PROCEEDINGS UNDER ENGLISH ACT, EFFECT OF ON COLONIAL ASSETS.—See Bankruptcy Act, 1869 (1) 1

MALICIOUS ARREST.—*Trespass*.—8th Rule of Court.—*Damages*.—

Costs.—H. having brought two actions against P., the latter proceeded to leave the Colony, after being examined on commission, shortly before the trial. H., having failed to obtain security, caused P. to be arrested, but the writ was subsequently set aside. P. brought an action for malicious arrest and trespass. *Held*, on the facts, that there was no evidence of malice, but that, the writ having been set aside, the arrest amounted to a trespass, for which the plaintiff was entitled to recover; but that the circumstances were such as to justify the Court in awarding only nominal damages, without costs.

Pullinger vs. Harsant 111

MINES SITUATE ON PRIVATE LANDS.—See Interdict (3) 154

MINING BOARD, POWERS OF.—See Interdict (3) 154

MISCONDUCT.—See Ordinance 6, 1843 (1) 99

MISREPRESENTATIONS BY SECRETARY.—See Joint-stock Company (3) 172

NEGLIGENCE.—See Pleading (1) 8

NOVATION.—See Provisional Sentence (8) 150

OMISSION TO DISCLOSE LIABILITIES.—See Provisional Sentence (7) .. 125

ORDER TO TRANSFER CLAIMS, EFFECT OF.—See Jurisdiction of High Court 5

ORDINANCE 72, SECT. 29.—*Effect of plea of guilty*.—Where a prisoner pleads guilty, and the Magistrate has before him a statement on oath disclosing the commission of the crime alleged, it is nevertheless desirable for some evidence to be taken in the prisoner's presence in support of the charge. *Queen vs. Jack* 187

1. ORD. 6, 1843, §§ 41, 42, 52.—*Removal of trustee*.—*Misconduct*.—Where certain creditors of an insolvent estate sought to set aside the election of the trustee on various grounds, of which the only one seriously pressed was an allegation of misconduct, and the alleged misconduct was that the trustee's report failed to sufficiently disclose the nature of certain transactions between the insolvent and various creditors, which required investigation, and also that the trustee had been guilty of neglect in not applying for a commission to examine certain witnesses as directed at a meeting of creditors; the Court, finding no proof of *mala fides* in the conduct of the trustee in the matters complained of, refused to set aside his election. *Goldschmidt and Company vs. Page* 99

2. — §§ 8, 44, 100, 109, 111.—See Insolvency (2) 134

3. — §§ 4, 12, 17, 30.—See Compulsory Sequestration 140

ORDINANCES 10 OF 1874 AND 15 OF 1879, G.W.—See Interdict (3) .. 154

ORD. 24, 1874, G.W., § 4.—See Act 27, 1882, §§ 5 and 9 189

ORDINANCES 16, 1879, G.W., § 51, and 19, 1880, G.W., §§ 5 and 11.—*Contravention of Wine and Spirits Ordinances*.—*Holder of licence*.—*Trustee of insolvent licensee*.—Where an insolvent, the holder of a licence to sell wines, &c., left his licensed premises

in the hands of his trustee, who continued the business but did not procure a transfer of the licence into his own name, and thereafter an illicit sale of spirits took place at the premises by a servant in charge :—*Held*, that the insolvent was not responsible for such illicit sale. *Queen vs. Naiget* 63

PACTUM DE NON PETENDO.—See Provisional Sentence (4 and 8) 39, 150

PARTNERSHIP.—*Adoption by partnership of contract of previous owner of business.*—*Association for the purpose of forming a Company.*—*Holding out and giving credit.*—*Quasi partners.*—*Liability for goods supplied to inchoate Company.*—T., a manufacturer of aerated waters, &c., ordered a soda-water machine from M. & Co. Previous to the delivery of the machine, he agreed with F. & W. to sell his business to a joint-stock Company of which F. and W. were promoters and in which T. was to receive a large number of shares. T. then retired from the management of the business, which was carried on in his absence by F. M. & Co. were informed by both T. and F. of the intended formation of the Company, and supplied the machine, and other goods afterwards ordered for the business, debiting the Company, which however they knew had not then been formed, in their books. The attempt to form a Company having fallen through, W. took no part in the management of the business, which was carried on by F., acting to some extent under instructions from T., who was still absent and who had never transferred the property. The orders to M. & Co. were received from an agent of F., and ratified by him. T. also corresponded with M. & Co., on the subject of the business, of which he afterwards resumed possession and attempted to effect a sale, the proceeds of which were to be divided between him and F. F., T. and W. subsequently disclaimed any responsibility, either jointly or severally, for the goods supplied, and M. and Co. sued them as partners. *Held*, that there was no evidence of partnership against W., who was therefore absolved from the instance; but that the facts disclosed and amounted to a partnership for the purpose of carrying on the business between F. and T., who were therefore jointly liable for the goods supplied. *Mackie Dunn & Company vs. Tilley and others* 77

PAYMENT OF APPLICATION MONEY.—See Joint-stock Company (3) 172

PEREGRINUS.—See Arrest 55

PLEA OF GUILTY, EFFECT OF.—See Ordinance No. 72, § 29 .. 187

1. PLEADING. *Exception.*—*Set off and counterclaim.*—*Rules of Court of 1880.*—*Negligence.*—*Action by coach proprietors against guard for damages alleged to have been sustained owing to negligence of the latter.*—Where a plaintiff claimed a certain sum for wages due and money advanced and the defendants set up a counterclaim for certain moneys which they had been compelled to disburse owing to the alleged negligence of the plaintiff :—*Held*, that the defendants were entitled to plead the amount of

their counterclaim by way of partial set-off to the plaintiff's demand, and to tender for the balance of his claim. In an action for damages alleged to have been sustained by the proprietors of a coach owing to the negligence of a guard in their employ:—*Held*, on the facts, that while there was evidence of negligence on the part of the proprietors whereby they might have been liable in damages to third parties, negligence on the part of the guard had not been proved. *Hofmeyr vs. Kruger and Verster* 8

2. ——— *Building contract*.—*Architect's certificate*.—*Reference in plea to general conditions of contract annexed*.—*Issuable plea*.—*Claim in reconvention*.—In an action on a contract the defendant's plea should state specifically the portions of the contract on which he relies, and should explicitly allege the breach or non-performance of the same. A plea of set-off, if defective through being vague and embarrassing, is not cured by a more explicit statement of the nature of the alleged set-off contained in a claim in reconvention. An order to plead issuably does not debar a defendant from setting up a counterclaim arising out of the contract on which the plaintiff sues. *Park vs. Bank of Africa* 66

PLEADINGS IN MAGISTRATE'S COURT, AMENDMENT OF.—*Act 20, 1856, §§ 33 and 50, and Schedule B., Rules 10, 28, 31, 33*.—An action having been brought in a Magistrate's Court against K., "Manager of the L. and S. A. Company," and the summons having been amended by the insertion before the word "Manager" of the words "in his capacity as," and judgment having thereupon been given against the Company:—*Held*, that it was incompetent for K. in his private capacity to appeal against the said judgment. An appeal against the same judgment having then been brought by the defendant Company:—*Held*, that as the defendant had not appeared at the trial the judgment was necessarily provisional in its nature, and not a final judgment; and there was therefore no right of appeal against it. *Kilgour vs. Lotz*.—*London and South African Exploration Company, Limited, vs. Lotz* 14

POWERS OF RECEIVER UNDER ENGLISH LIQUIDATION.—See *Insolvency (1)* 17

— OF MINING BOARD.—See *Interdict (3)* 154

PREPARATORY EXAMINATION.—See *Act 3, 1861, § 29* 193

PROCLAMATIONS 71 OF 1871 AND 8 OF 1880, G.W.—See *Interdict (3)* 154

PROOF OF PREVIOUS CONVICTIONS.—*Act 17, 1874, § 6, and Act 21, 1876, § 5*.—The proof of previous convictions before judgment, though a serious irregularity, does not necessarily involve the quashing of the conviction. The attention of Magistrates directed to the necessity of all sentences of lashes being confirmed on review before being carried out. *Queen vs. Williams* 186

PROSPECTUS.—See *Joint-stock Company (3)* 172

1. PROVISIONAL SENTENCE.—*Act 23, 1861, §§ 2 and 5*.—*Action against individual partners on debt of firm*.—Can provisional sentence be obtained on a promissory note purporting to be

- endorsed on behalf of a joint-stock company, but omitting the word "Limited" as the last word of the company's name? [*Not decided.*] If a promissory note is made or endorsed by a firm, the firm and not the individual partners should in the first instance be sued on the note. *Bank of Africa vs. Kimberley Mining Board and others* 12
2. — *Set-off.—Liability of endorser.—Custom of Bankers.*—B., the manager of a bank, applied for provisional sentence on a promissory note endorsed by K. in blank. K., at the time both of the dishonour of the note and of the action being brought, had funds in the bank sufficient to meet his liability on the note. *Held*, that B. should not have sued K., but should have debited his account with the amount due by him on the note. *Ball vs. Keefer* 27
3. — *Deed of assignment.—Breach of conditions.*—A debtor, having assigned his estate for the benefit of his creditors, omitted, contrary to the provisions of the deed of assignment, to schedule the claims of certain creditors, one of whom subsequently obtained judgment and attached part of the estate. *Held*, that, there having been a breach of the conditions of the assignment, it was no longer operative, and afforded no defence to a claim for provisional sentence by one of the creditors who was a party to the deed. *Harvey vs. Crawford* 31
4. — *Pactum de non petendo.*—Provisional sentence granted on certain promissory notes, where the defendants set up an oral agreement to give time alleged to have been made before or at the time of the making of the notes sued upon, and where the plaintiffs alleged that such agreement was conditional upon the consent of all the creditors being given, and all had not consented. The grounds of defence to claims for provisional sentence discussed. *Tarry & Company vs. South West Diamond Mining Company, Limited* 39
5. — *Summons.—Description of defendant.—Fraud of endorser.—Bona fide holder for value.*—A promissory note made by O. in favour of T. or order, and by T. and S. endorsed in blank, was previous to maturity passed by S. to a Bank as collateral security for an overdraft and other liabilities of S. to the Bank. It was alleged that at this time S. was a fraudulent holder of the note and was under obligation to return it to the maker, from whom he had already received payment. The Bank after dishonour sued the maker. *Held*, that the plaintiff, having had no notice of the alleged transactions between O. and S., was entitled to provisional sentence. The description of a defendant by an initial in lieu of her second Christian name, followed by the full description of her husband, to whom she was married out of community, is not such a misdescription as to vitiate a summons for provisional sentence. *Dell, N.O., vs. Otto* 53
6. — *Endorsement.*—Provisional sentence refused on a promissory note on an uncontradicted allegation by the defendant that on the dishonour of the note he had passed and subsequently paid a renewal thereof with the knowledge and consent of the then

holder of the original note, whose trustees now sued, and who had been connected in business with the payee of the later note. If a note payable to order is endorsed by the payee in blank, it is not necessary, in a summons against the maker for provisional sentence, to set out in full all subsequent similar endorsements. <i>Trustees of Gates vs. Le Roux</i>	122
7. — <i>Deed of assignment.—Covenant not to sue.—Omission to disclose liabilities.</i> —Where a debtor assigned his estate to his principal creditors, who, in consideration <i>inter alia</i> of a full disclosure in a schedule annexed to the deed of all the debtor's liabilities, agreed to work out the estate and covenanted not to sue the debtor for the amount due to them, and the debtor omitted to include certain liabilities in the schedule:— <i>Held</i> , that the assignees were entitled to provisional sentence on certain promissory notes made in their favour by the assignor previous to the execution of the deed, and that they were not debarred from this remedy by the circumstance that they had subsequently endeavoured to compromise with the creditors whose claims had not been disclosed. <i>Dreyfus and Company vs. Rintel</i>	125
8. — <i>Irregular Service of Summons.—Giving of time.—Pactum de non petendo.—Novation.—Discharge of endorser by election to charge maker.</i> —Provisional sentence refused against the maker of certain promissory notes, who had not been served with a true copy of the original summons, the copy served failing to disclose the signature of the Registrar, and the name of the plaintiff's attorney. Provisional sentence granted against the endorser of the same notes, notwithstanding allegations that the holder had elected to charge the maker only and that there had been a novation of contract as between him and the endorser, such allegations not being substantiated by the affidavits. <i>Bank of Africa vs. Kimberley Mining Board and Gem Diamond Mining Company, Limited</i>	150
REASONABLE ADVERTISEMENT.—See Sheriff's Sale (1)	149
RECEIVER AND MANAGER, APPOINTMENT OF.—See Bankruptcy Act, 1869 (1)	1
REFERENCE IN PLEA TO GENERAL CONDITIONS OF CONTRACT ANNEXED.—See Pleading (2)	66
1. REMITTAL BY CROWN PROSECUTOR UNDER LIBEL ACT, 1882.—See Act 46, 1882	191
2. — ON NEW CHARGE, EFFECT OF.—See Act 3, 1861	193
REMOVAL OF TRUSTEE.—See Ord. 6, 1843 (1)	99
1. RULE OF COURT, No. 8.—See Malicious Arrest	111
2. — No. 105-113.—See Sheriff's Sale (2)	166
3. — No. 148.—See Compulsory Sequestration	140
4. — No. 354.—See Joint-stock Company (2)	162
RULES OF COURT OF 1880.—See Pleading (1)	8
SECURED CREDITOR.—See Joint-stock Company (1)	61
SECURED JUDGMENT CREDITOR.—See Joint-stock Company (2)	162

	PAGE
SET-OFF.—See Provisional Sentence (2)	27
SET-OFF AND COUNTERCLAIM.—See Pleading (1)	8
SHAREHOLDER'S PETITION.—See Winding-up Order	169
1. SHERIFF'S SALE.— <i>Reasonable advertisement.</i> — <i>Judgment creditor.</i> —An execution sale was duly advertised but postponed owing to a rule <i>nisi</i> having been granted for an <i>interim</i> interdict. The rule having been discharged, the Deputy Sheriff adver- tised on Dec. 3 that the sale would take place on Dec. 5. <i>Held</i> , that the advertisement was in the circumstances a sufficient notice of the sale. <i>Dreyfus and Co. vs. Cornwall,</i> <i>N.O.</i>	149
2. — <i>Irregularities by Deputy Sheriff.</i> — <i>Conditions of sale and</i> <i>valuation of property attached.</i> — <i>Rules of Court</i> , 105–113. — <i>Costs.</i> —Where the Deputy Sheriff, after obtaining a valua- tion on oath of property attached, with a view to an execution sale, subsequently, without consulting the parties interested in the sale of the property, obtained other informal opinions as to its value, in consequence of which he lowered his reserve and sold the property for little more than one-third of the amount of the sworn valuation; and where he also at the time of the sale added certain verbal conditions varying from those con- tained in the published advertisement; the Court refused to confirm the sale and ordered the Deputy Sheriff to pay the costs of the application. <i>Cornwall, N.O., and others vs.</i> <i>Dreyfus and Company</i>	166
SITTINGS OF HIGH COURT IN VACATION.—See Joint-stock Com- pany (2)	162
SLANDER OF TITLE.—See Interdict (3)	154
SPLITTING CHARGES.—See Act 27, 1882, §§ 5 and 9	189
SUMMONS.—See Provisional Sentence (5)	53
TRESPASS.—See Malicious Arrest	111
1. TRUSTEE OF INSOLVENT LICENCEE.—See Ordinances 16 of 1879 and 19 of 1880, G.W.	63
2. — Removal of.—See Ord. 6 of 1843 (1)	99
WINDING-UP ORDER.—Act 12, 1868, §§ 2–4.— <i>Shareholder's petition.</i> —An application for a winding-up order, under sect. 3, sub- sect. 1 of Act 12 of 1868, refused, on the ground that the petition did not state that the alleged judgment-debt remained unsecured as well as unpaid, or that it had remained unsatisfied without the consent of the judgment creditor. A subsequent petition presented by the holder of fully paid-up shares refused, on the ground that as he alleged the inability of the Company to pay its debts, he had no interest in the matter, there being no probability of a surplus in the liquidation available for distribution among the shareholders. <i>In re</i> <i>Standard Diamond Mining Company, Limited</i>	169
WINDING-UP PETITION.—See Joint-stock Company (2)	162
WINE AND SPIRITS ORDINANCES, G.W., CONTRAVENTION OF.—See Ordinances 16 of 1879 and 19 of 1880, G.W.	63

CASES DECIDED

IN THE

HIGH COURT OF GRIQUALAND.

VOL. II.—PART I.

ROSS, PRIEST, AND PAGE *vs.* SABER BROTHERS.

Bankruptcy Act, 1869, sect. 74.—Appointment of receiver and manager.—Effect of liquidation proceedings under English Act on colonial assets.

Under sect. 74 of the English Bankruptcy Act, 1869 (32 & 33 Vict. cap. 71) the Courts of this Colony having insolvency jurisdiction will act in aid of and be auxiliary to the London Bankruptcy Court; and, on an order and request of that Court seeking such aid, will recognise the appointment by the said Court of a receiver and manager of the business of a firm carrying on business in London and the Cape Colony.

This was an application for the appointment of a Receiver and Manager of the business of the firm of Saber Brothers, merchants of London and Kimberley, and for such other and further relief as might seem meet. The applicants, a firm of accountants at Kimberley, set forth in their petition that the respondent firm had presented a petition to the London Court of Bankruptcy for an order for liquidation by arrangement in terms of the Bankruptcy Act, 1869. Thereafter, on August 1st, the said Court, on the application of the said

1883.
Sept. 10.
" 18.
—
Ross, Priest,
and Page vs.
Saber Bros.

firm, had appointed Mr. A. O. Miles, Chartered Accountant of the City of London, receiver and manager of the business of the said firm for the benefit of the creditors, and ordered him to take possession thereof; thereafter, on the same day, on the application of the said firm and the said Miles for an order and request under section 74 of the said Act, and on reading the affidavits of Joseph Saber and the said A. O. Miles, the said Court had made the following order:—"That aid be sought from the Colonial Courts in South Africa and this Court doth hereby request the said Courts and especially such Courts as have Insolvency and Bankruptcy jurisdiction to act in aid of and be auxiliary to this Court for the purpose of recognising the appointment of A. O. Miles as receiver and manager of the business of the above named debtors and generally to exercise the like jurisdiction which this Court could exercise in regard to similar matters within the said Court's jurisdiction." The applicants had been duly authorised by the said Receiver in terms of this order to apply to this Court for relief. They represented a very large proportion of the creditors of the firm, and in the interest of the estate it was necessary that a receiver and manager should be appointed for the Kimberley business of the firm, to aid the receiver appointed by the Court of Bankruptcy and to assist in carrying out the order of that Court. The original orders of the London Court and a special power of attorney given by Miles to Ross, a partner in the applicants' firm, were put in.

Levey, on behalf of the respondents, said he was instructed to leave the matter in the hands of the Court.

Forster (with him *Solomon*), in support of the application, referred to the English Bankruptcy Act, 1869, sect. 74, in terms of which the order and request had been made by the London Court. He contended that under this order a receiver should be appointed for the Colonial business; as to the construction of the section he referred to *In re Vaughan*, 6 Ch. D. 350. He also cited *Burge on Colonial and Foreign Laws*, iii. 904, 906, 913, and the judgment of Lord Loughborough in *Sill vs. Worswick*, 1 H. Bl. 665, with other cases mentioned by *Burge, ubi supra*.

LAURENCE, J.:—If the English creditors of a firm trading at Kimberley had just sufficient claim on the estate to obtain an order from the London Court, would the assets of the Colonial business be attached by reason of that order?

1883.
Sept. 10.
" 18.
—
Ross, Priest
and Page vs.
Saber Bros.

Forster:—I am prepared to go so far as to say so.

BUCHANAN, J.P.:—The difficulty which the Court feels would perhaps have been removed had the firm been adjudicated insolvent; at present we do not know what is the position of the Colonial firm; judgment for a large amount has been given against them this morning.

Forster said it was extremely difficult to find authorities in support of his contention and actually bearing on the point in question. No direct authority as to the operation and effect of section 74, under circumstances like the present, could be found in the books.

BUCHANAN, J.P.:—Speaking from memory, I think this is the first application of the kind in the Colony.

Forster:—In this Colony; neither have I been able to find any case under the section in the reports of the Colony of Victoria; I cannot say as to the other Colonies. The principle of the English Bankruptcy Law is that the London Court, through its trustee, could attach all property in a bankrupt estate wherever situated.

LAURENCE, J.:—Then the Colonial creditors would be bound for their own protection to inquire into the state of the affairs of the home firm?

Forster:—It is the duty of creditors, where a business is carried on at two places, to ascertain its stability before doing business with it. In the absence of any Colonial enactment to the contrary, or of any creditors opposing who had got a preferent lien, he submitted that the Court was bound to give effect to the order of the London Court.

BUCHANAN, J.P.:—There is nothing to shew that the firm is insolvent here.

1883.
Sept. 10.
" 18.

Ross, Priest,
and Page vs.
Saber Bros.

Forster :—No; it is clear that the section was inserted in order to avoid two sequestrations in a case of this kind.

LAURENCE, J. :—The local assets might be sufficient to pay 20s. in the £; and yet if the Court appoints a receiver as agent of the London creditors, the local creditors might obtain very little.

Forster contended that the local creditors, if unsecured, had no *locus standi* to oppose this application. There was nothing to shew that a Colonial adjudication was necessary. He referred to *Ellis vs. McHenry*, L. R. 6 C. P. 228, *Bartley vs. Hodges*, 30 L. J., Q. B., 352; *the Amalia*, 1 Moore P. C. C. (N.S.) 471; *Story on Conflict of Laws*, sect. 403 and following sections.

Cur. adv. vult.

Postea (Sept. 18) :—

BUCHANAN, J.P., said :—This is an application of considerable importance, and so far as I am aware of entire novelty so far at all events as the Courts of this Colony are concerned. In view of the probability of further applications being made, should the English liquidation proceedings in the case of this firm be continued, it appears to me desirable at the present stage of the case to say as little as possible, especially as the matter has hitherto been before us only so to speak *ex parte*. The application is for the appointment of a Receiver and Manager of the business of Messrs. Saber Brothers, a firm carrying on business at London and Kimberley, and also for such further and other relief as the case may require. It appears however that a Receiver and Manager has already been appointed by the London Court; and the order and request under section 74 of the English Bankruptcy Act, under which this application is made, is in effect for the recognition by this Court of that appointment. This recognition I think, as a matter of comity, in the absence of any authorities to the contrary, we are bound to give; but I do not think that at present it is necessary or advisable to make any further order. The Court will there-

fore make an order that "This Court, acting in aid of and as auxiliary to the London Court of Bankruptcy, hereby recognises the appointment of Mr. A. O. Miles as Receiver and Manager of the business of Messrs. Saber Brothers, carrying on business at London and Kimberley."

1883.
Sept. 10.
" 18.
—
Ross, Priest,
and Page vs.
Saber Bros.

LAURENCE, J.:—In this case I had prepared a written judgment dealing fully with the various important points raised by the argument of counsel on behalf of the applicants, but on further reflection there appear to be circumstances in this case, especially as the matter has hitherto been before us only *ex parte*, which render it expedient for me not to deliver that judgment, at all events at present, but simply to express my concurrence in the order which has been made. That order will leave it open to the applicants to take such steps with regard to this estate, under the power of attorney received from Mr. Miles, as they may be advised. (a) (b)

[Applicants' Attorneys, GRAHAM & GILBERT.]

PRESTON AND DIXON vs. TRUSTEE OF BIDEN.

Jurisdiction of High Court in respect of judgment of Court of Appeal.—Act 5, 1879, sect. 16.—Liability for arrear licences on claims.—Effect of order to transfer.

The High Court has jurisdiction to enforce a judgment of the Court of Appeal reversing the judgment of the High Court.

It having been decided that certain claims registered in the name of the defendant were the property of the plaintiff's, and the defendant having been ordered to give the plaintiff's transfer of the same:—Held, that the defendant was not compelled by reason of this order to pay certain arrear

(a) [See also *Miles (Receiver of Saber Bros.) vs. Deputy Sheriff and Cape of Good Hope Bank*, *infra*, p. 17.—Ed.]

(b) The judgment here referred to will be found in the *Cape Law Journal*, vol. i., part iii.

licence money due from the owners of the claims and payable by them, and without payment of which transfer could not be effected in the office of the Registrar of Claims.

1883.
Sept. 11.
" 13.

Preston and
Dixon vs.
Trustee of Biden.

This was an application calling upon the defendant to shew cause why he had not satisfied the Judgment of the Court of Appeal, in appeal from this Court, in a case between the same parties, and why he should not be committed for contempt of Court for his failure to do so, and be ordered to pay the costs of this application *de bonis propriis*. Mr. H. S. Caldecott, attorney for the applicants, stated in his affidavit that he had written to the respondent requesting him to transfer certain claims to the applicants, in terms of the order of the Court of Appeal, but had received no reply to his letter, and the said judgment still remained wholly unsatisfied. To this the respondent replied that he had never refused to transfer the claims in question, but it was impossible for him to do so inasmuch as the applicants contended that the arrear licence money due thereon, and which had to be paid before transfer could be effected, was payable by him, which he denied, and he believed proceedings would be instituted for the purpose of deciding the question of liability, and till this was done it was impossible to comply with the order.

Forster, for the respondent, took a preliminary objection that this Court had no jurisdiction to entertain an application for committal for contempt in disobeying an order of the Court of Appeal, or otherwise to deal with any application in respect to an order of that Court.

Hoskyns, C.P. (with him *Lange*), for the applicants, replied that the order of the Court of Appeal now stood in the place of the original judgment of this Court, which had been reversed. The case was parallel to that of a judgment of this Court reversing that of a Magistrate, as to which the Rule was clear; section 39 of Schedule B to Act 20, 1856, *Tenant's Rules of Court*, 313.

LAURENCE, J.:—Surely the application for the committal of the respondent is not insisted on? Is it not clear that he has acted in the *bona fide* belief that the position he took up

was legally justified, and that there has been at all events no wilful contempt of the order of the Court of Appeal?

1883.
Sept. 11.
" 13.

Preston and
Dixon vs.
Trustee of Biden.

Hoskyns, C.P., said after that expression of opinion he would withdraw the portion of the motion in which the committal of the respondent was applied for.

Forster referred to Act 5, 1879, sect. 16, as to the enforcement of judgments of the Court of Appeal by that Court.

Postea (Sept. 13),—

The Court overruled the preliminary objection to the jurisdiction, holding that the judgment of the Court of Appeal now stood in the same position as an original judgment of this Court, and that there was nothing in section 16 of Act 5, 1879, to prevent this Court from enforcing the same.

Hoskyns, C.P., then argued that the order of the Court was absolute. The respondent was bound to transfer these claims, and must therefore do everything necessary thereto, including the payment of the arrear licence money. He referred to *Rodger vs. Comptoir d'Escompte de Paris*, 1 Moore P. C. C. (N.S.) 314.

Forster, for the respondent, was not called upon.

THE COURT dismissed the application, with costs, it not being shewn that the respondent had refused to carry out the order of the Court of Appeal, or that there was any obligation on him to pay the arrear licences. The licences were equivalent to a sort of rent-charge on the claims, which had been held by the Court of Appeal to have belonged all along to the applicants, and it was therefore for them, as the owners, to bear the burden of such charges. It might be argued that the applicants were entitled to damages for the retention of their property by the respondent; but the claim for damage had been before the Court of Appeal, which had refused to give effect to it. There was no reason to suppose that there would be any refusal on the part of the respondent to give transfer as soon as the applicants, by paying the arrears due from them, put him in a position to do so.

[Applicants' Attorneys, STOW & CALDERCOTT.]
[Respondent's Attorneys, GRAHAM & GILBERT.]

HOFMEYR vs. KRUGER AND VERSTER.

Pleading.—Exception.—Set-off and counter-claim.—Rules of Court of 1880.—Negligence.—Action by coach proprietors against guard for damages sustained owing to negligence of the latter.

Where a plaintiff claimed a certain sum for wages due and moneys advanced and the defendants set up a counter-claim for certain moneys which they had been compelled to disburse owing to the alleged negligence of the plaintiff:—Held, that the defendants were entitled to plead the amount of their counter-claim by way of partial set-off to the plaintiff's demand, and to tender for the balance of his claim.

In an action for damages alleged to have been sustained by the proprietors of a coach owing to the negligence of a guard in their employ:—Held, on the facts, that while there was evidence of negligence on the part of the proprietors whereby they might have been liable in damages to third parties, negligence on the part of the guard had not been proved.

1883.
Sept. 13.
" 25.
" 26.
" 28.
Hofmeyr vs.
Kruger and
Verster.

In this action the plaintiff, a guard in the employ of the defendants, a firm of coach proprietors, claimed the sum of £140 15s. 6d. for salary due and moneys advanced on account of the defendants. The defendants admitted the claim, but pleaded that on or about February 12th, 1883, while the plaintiff was in charge of the defendants' coach and horses in Kimberley, he left them unattended and the horses ran away, and damage was done to the amount in all of £58 13s. On another occasion a certain case of ostrich feathers in charge of the defendants was lost owing to the negligence of the plaintiff, and the defendants had been compelled to pay the owner the sum of £46, being the value of the said case. The defendants claimed to set off these sums, amounting together to £104 13s., against the plaintiff's claim, and tendered the balance. They also claimed the sum of £104 13s. in reconvention. The plaintiff excepted to the plea on the ground that it was incompetent to plead an

unliquidated claim for damages by way of set off or compensation against a debt or liquid demand. He replied over, joining issue, and further specially replied that the tender made was insufficient, and also that subsequently to the alleged acts of negligence now complained of the defendants, in consideration of further services rendered by the plaintiff at their request, had waived any claim they might have had against the plaintiff for damages in respect thereof, and had agreed to pay him the full amount due to him without any deduction. In his plea to the claim in reconvention the plaintiff denied that the coach accident had occurred, or the case of ostrich feathers been lost, through any negligence on his part, and pleaded that the defendants were not legally liable for any sums they might have expended in respect of these matters, as there had been no negligence, and further contended that, if they were so bound, they could not under the circumstances recover the same from him. He also repeated and relied on the allegation in his replication of a subsequent agreement and admission by the defendants of their liability for the sums now claimed by him. The defendants joined issue on the exception, replication and plea in reconvention. The exception came on for argument on September 13th.

1883.
Sept. 13.
" 25.
" 26.
" 28.

Hofmeyr vs.
Kruger and
Verster.

Hoskyns, C.P., in support of the exception, argued that it was incompetent to set off an unliquidated claim for damages against an admitted liquidated claim; *Van der Linden*, 271; *Pothier*, ii. 113. By the Roman law mutual debts were extinguished by *compensatio*, while by the English law there is a set off and claim for the balance; *Cunningham and Matkinson's Precedents*, 72; Judicature Act, Order xix. Rule 3. This however had never been enacted here, and our law on the point was clear as laid down by *Van der Linden*.

Forster, contra:—It is admitted that the defendants' claim can be set up in reconvention, but not it is said as a plea. But in matters of pleadings the Courts of this Colony follow the practice at Westminster (Charter of Justice, sect. 46) and not the old Dutch practice. It has been customary in our Courts to set up in reconvention illiquid claims for damages, and at the same time to claim to be allowed to set

1883.
Sept. 13.
" 25.
" 26.
" 28.
Hofmeyr vs.
Kruger and
Verster.

off the same in convention; *Buchanan's Precedents*, 149, 196. Under the new Rules of Court the pleadings in an action should be so drawn as to determine "the real question or questions in controversy between the parties;" Rule 10 (a) of March 1880, *Tennant's Ed.* [334]. It is further submitted that the claims of both parties are in this case sufficiently liquidated to be capable according to *Van der Linden* of mutual set off.

Hoskyns, C.P., in reply:—Unliquidated damages cannot be set off against an admitted debt.

BUCHANAN, J.P., referred to *Voet*, xvi. 2, 12 and v. 1, 78.

Hoskyns, C.P., cited *Grotius* iii. 4, 10; *Cod.* 4, 31, 14, 1; *Voet*, xvi. 2, 17; *Bell's Commentaries on the Law of Scotland*, ii. 122. As to *Voet*, xvi. 2, 12, 1, *compensatio* there referred to is apparently in the setting off of judgments, and does not mean a set off in pleadings.

BUCHANAN, J.P.:—The old authorities as to the cases which admit of *compensatio* or set off are perhaps not in entire agreement, some writers requiring a greater and more absolute liquidity in the nature of the debt to be set off, while others like *Voet* are apparently inclined to extend the cases in which *compensatio* is pleadable. I think, however, so far as the present case is concerned, that the claim of the defendants is of a nature "sufficiently capable of immediate liquidation" to entitle them to plead it by way of a set off; and that this is a case in which the Court will be carrying out the spirit of our new Rules of Court, by which it was clearly intended to follow the English practice and provide for the determination, whenever practicable, in a single action, of all the matters in controversy between the parties, by allowing the pleadings to stand, and leaving the various matters in issue to be decided at the trial. The exception must therefore be overruled, with costs.

LAURENCE, J.:—I concur. The defendants admit the amount of the plaintiff's claim, which is partly for moneys expended on their account; therefore if they were not

allowed to plead in set off their own counter-claim, which is for moneys alleged to have been expended on the plaintiff's account, or for which expenditure he is at all events said to be responsible, they would be obliged to pay into Court, or to tender by their plea, the whole amount claimed by the plaintiff, and the plaintiff would be able to obtain this sum under Rule 8 of 1880 (*Tennant*, [332]). When the original claim is thus disposed of it is a matter of considerable doubt, and there have been in England conflicting decisions on the subject, whether the counter-claim does not fall to the ground as well, and whether the defendants would not be compelled to institute fresh proceedings for the satisfaction of their demand. Rule 6 of 1880, sect. (a) (*Tennant*, 330), clearly contemplates the consolidation in one action not only of "several distinct claims or causes of complaint," but also of "several distinct grounds of defence, set off, or claim in reconvention." By allowing this exception to the plea the Court might prevent the determination in one action of the several "questions in controversy between the parties," a result which clearly would not be in accordance with the spirit and intention of the present rules of pleading.

The exception was therefore disallowed, with costs.

The action came on for trial on September 25th. In the course of the hearing the defendants were obliged to abandon the claim for the lost case of ostrich feathers, as they were unable to prove that they had paid the sum of £46 on that account as alleged in the plea, and it appeared that an action was pending in the Supreme Court in which their liability for this loss had to be decided. A good deal of evidence was led on both sides as to the circumstances of the coach accident and the alleged subsequent agreement between the parties, by which the plaintiff contended that he had been released from his original liability for the damage sustained, if any, which he denied. At the close of the evidence,

After hearing *Forster* on behalf of the defendants,

THE COURT held, on the facts, that no negligence had been proved on the part of the plaintiff, but that the acci-

1883.
Sept. 13.
" 25.
" 26.
" 28.
Hofmeyr vs.
Kruger and
Verster.

1883.
Sept. 13.
" 25.
" 26.
" 28.
Hofmeyr vs.
Kruger and
Verster.

dent was rather attributable to the failure of the defendants to supply the plaintiff with adequate assistance for the discharge of his various duties on the arrival of the coach at the Kimberley Office, where the accident occurred; and accordingly gave judgment for the plaintiff in convention for the amount claimed, with costs, and also for the plaintiff as defendant in reconvention, with costs.

[Plaintiff's Attorney, DEWHURST.
Defendants' Attorney, CORYDON.]

BANK OF AFRICA vs. KIMBERLEY MINING BOARD AND OTHERS.

Provisional sentence.—Act 23, 1861, sections 2 and 5.—Action against individual partners on debt of firm.

Can provisional sentence be obtained on a promissory note purporting to be endorsed on behalf of a joint-stock Company, but omitting the word "Limited" as the last word of the Company's name? (Not decided.)

If a promissory note is made or endorsed by a firm, the firm and not the individual member should in the first instance be sued on the note.

1883.
Sept. 25.
Bank of Africa
vs. Kimberley
Mining Board
and others.

This was an application for provisional sentence on a promissory note made by the Chairman of the Kimberley Mining Board in favour of the other defendants (The Standard Diamond Mining Company, Limited, The British Diamond Mining Company, Limited, The Barnato Diamond Mining Company, Limited, The North East Diamond Mining Company, Limited, and Messrs. W. and B. Stuart, claimholders in the Kimberley Mine), carrying on business together under the style or designation of "The Joint Shaft Company," or order, and by F. B. Salomons, *q.q.* the defendants under the said style or designation endorsed.

Lord, Q.C., moved for provisional sentence.

Solomon, on behalf of the defendants other than the Mining

Board (for whom there was no appearance), objected that there was a misdescription in the note; "The Standard Diamond Mining Company, Limited" were sued and summoned as endorsers, but there was only an endorsement by Salomons "*q.q.* Standard Company," and similarly in the case of the other defendant Companies. He contended that the omission of the word "Limited" was fatal; Act 23, 1861, sect. 5 and sect. 2, sub-sect. 2.

1883.
Sept. 25.

Bank of Africa
vs. Kimberley
Mining Board
and others.

LAURENCE, J., pointed out that there was nothing in the section to prevent a Company paying the amount of a promissory note made or endorsed on their behalf without the word "Limited"; in fact the concluding words "unless the same shall be duly paid by the Company" seemed to imply a liability.

Solomon contended that there was no legal obligation on such a document on the part of the Company; the section provided not only a penalty but a personal liability on the note on the part of the official so endorsing. Moreover the summons was made out against the trustees of each of these Companies *in solidum* for the joint debt of the Joint Shaft Company. The liability of each Company, as a member of that firm, was joint not several. The firm called the "Joint Shaft Company" should be sued and excused first before any liability could arise on the part of the individual partners.

Lord, Q.C.:—The obligation under the Act to use the word "Limited" is for the protection of the public and the creditors, not of the Company, and a Company cannot take advantage of its own wrong, or that of its agents. As to the second objection, the partners are individually liable for the debt of the firm.

THE COURT asked whether it was not necessary to sue the firm in the first instance, although the goods of the individual partners might be liable to be taken in execution on the judgment.

Lord, Q.C.:—As the form of the summons no doubt creates some difficulty, I will be content to take provisional sentence against the Mining Board.

1883.
Sept. 25
—
Bank of Africa
vs. Kimberley
Mining Board
and others.

THE COURT accordingly granted provisional sentence against the Mining Board; but refused it against the other defendants, with costs.

[Plaintiff's Attorneys, STOW & CALDECOTT.]
[Defendants' Attorney, RHODES.]

KILGOUR vs. LOTZ.—LONDON AND SOUTH AFRICAN
EXPLORATION COMPANY vs. LOTZ.

Amendment of pleadings in Magistrate's Court.—Act 20, 1856, sections 33 and 50, and Schedule B, Rules 10, 28, 31, 33.

An action having been brought in a Magistrate's Court against K., "Manager of the L. and S. A. Company," and the summons having been amended by the insertion before the word "Manager" of the words "in his capacity as," and judgment having thereupon been given against the Company,—Held, that it was incompetent for K. in his private capacity to appeal against the said judgment.

An appeal against the same judgment having then been brought by the defendant Company,—Held, that as the defendant had not appeared at the trial the judgment was necessarily provisional in its nature, and not a final judgment; and there was therefore no right of appeal against it.

1883.
Sept. 18.
" 27.
—
Kilgour vs.
Lotz.—London &
S. African Expl.
Co. vs. Lotz.

These were two appeals from a judgment of the Resident Magistrate of Kimberley, in an action in which "George Kilgour, Manager of the London and South African Exploration Company, Limited" had been summoned to answer the claim of S. H. Lotz for £40 for work and labour done by the plaintiff in repairing a certain cart the property of the said Company at the request of the defendant. From the plaintiff's evidence it appeared that he had repaired the cart, which was the property of the Company and not of the defendant, on a written order signed on behalf of the Company by one Stevens. The Magistrate then, at the request of the plaintiff's attorney, amended the summons by inserting the words "in his capacity as" after the name of the

defendant and before the word "Manager." The defendant's attorney objected on the ground that he had only been instructed by Kilgour in his private capacity, and the Magistrate then postponed the case for three days in order to enable him to obtain instructions from the defendant Company, and a fresh power if necessary. On the case being resumed the attorney again appeared on behalf of Kilgour in his private capacity and applied for judgment which the Magistrate refused, holding that Kilgour was not before the Court. There was no appearance on behalf of the defendant Company, against whom the Magistrate gave judgment, with costs. Kilgour appealed.

Forster, for the appellant :—Kilgour in his private capacity was summoned and as there was no case against him he was entitled to judgment with costs, which he did not get. The appeal is not by the Company.

THE COURT pointed out that the Magistrate had given the defendant the costs occasioned by the amendment and postponement.

Forster :—The Magistrate had no right to make this amendment in the summons. The decision appealed from is the refusal of the application of Kilgour's attorney for judgment in favour of Kilgour in his private capacity. Kilgour's defence was that he was not liable on the contract ; the Company's defence was quite different, namely that the claim was excessive. The Magistrate held that Kilgour was not before the Court. This refusal to give judgment was equivalent to a judgment against him, against which he has a right to appeal. Kilgour was the only person before the Court.

Solomon, for the respondent, was not heard.

THE COURT held that, whether the Magistrate was right or wrong in amending the summons, after the amendment had been made the only parties before the Court were the plaintiff and the defendant Company, and Kilgour in his private capacity had no *locus standi* to appeal against the judgment against the Company. The appeal was therefore dismissed, with costs.

1883.
Sept. 18.
" 27.
Kilgour vs.
Lotz.—London &
S. African Expl.
Co. vs. Lotz.

1883.
Sept. 18.
" 27.

Kilgour vs.
Lotz.—London &
S. African Expl.
Co. vs. Lotz.

Postea (Sept. 27), an appeal against the same judgment was brought on behalf of the defendant Company.

Forster, for the appellant, contended that the Magistrate had no power to order this amendment in the summons; there should have been a fresh summons with proper service on the Company. The only power of amendment possessed by the Magistrate was under Sect. 50 of Act 20, 1856, which did not cover an alteration of this kind.

LAURENCE, J.:—Might not the alteration be regarded merely as the remedying of a misnomer in the name of the defendant of such a nature as, according to the proviso in the section, would not vitiate the summons?

Forster:—By inserting the words "in his capacity as" the Magistrate really struck out a party to the record and substituted another, which was *ultra vires*. The Company had never been summoned at all, even by a misnomer, which might have been cured under section 50. The words "at the instance and request of the defendant" in the summons clearly referred to Kilgour, and not to the defendant Company, which was never summoned, although the evidence shewed a request by the Company, if by anyone. The case was postponed merely for the attorney to obtain a fresh power, but the attorney was retained by Kilgour, not by the Company. The ambiguity was in itself a sufficient ground for quashing the summons; if it could have been amended there should at all events have been proper service on the substituted defendant; it did not even appear that the summons had been served on Kilgour at the Company's place of business; he referred to Rules 10 and 28, Schedule B to Act 20, 1856. The judgment itself was *ultra vires*, as, the defendant not being before the Court, it should have been provisional and not final.

Solomon, for the respondent:—As the defendant Company did not appear, this must be taken to be a provisional judgment under Rule 28, which makes a judgment given by a Magistrate in the absence of the defendant "only provisional in its nature," without any necessity for it to be expressly described as such. That being so, the judgment not being

final, there can be no appeal; Act 20, 1856, Sect. 33, and Rule 33, Schedule B. The defendant should have applied for a reopening of the case under Rule 31.

Forster replied.

1883.
Sept. 18.
" 27.
Kilgour vs.
Lotz.—London &
S. African Expl.
Co. vs. Lotz.

THE COURT held that the judgment delivered by the Magistrate, in the absence of any appearance on the part of the defendant Company, was necessarily provisional, and the proper course for the defendant to take was to apply to the Magistrate to reopen the case under Rule 31. The appeal was premature, as not being against a final judgment, and must be dismissed with costs.

[Appellants' Attorneys, STOW & CALDECOTT.]
[Respondent's Attorney, CAMPBELL.]

In re SABER BROTHERS: MILES vs. DEPUTY SHERIFF
AND CAPE OF GOOD HOPE BANK.

Insolvency.—English Bankruptcy Act, 1869.—Liquidation by arrangement.—Power of receiver under English liquidation.—Attachment by judgment creditor.—Conflict of laws.

S. Bros., merchants of London and Kimberley, presented a petition for liquidation by arrangement under the English Bankruptcy Act, 1869. M. was appointed receiver and manager of the business in liquidation by the London Court, and his appointment was subsequently recognised by the High Court, under sect. 74 of the Bankruptcy Act. After he had applied for but before he had obtained such recognition, a local judgment creditor had obtained an attachment on the goods of S. An application by M. for an order removing the attachment was refused.

This was an application for an order to remove an attachment placed by the respondent, the Deputy Sheriff, on certain goods, the property of Messrs. Saber Brothers, of London and Kimberley, at the instance of the respondent Bank as judgment creditors, and further for an order for the delivery

1883.
Sept. 27.
O. 1. 2.
" 4.
—
In re S. Bros.
Miles vs. Deputy
Scheriff and Cape
of Good Hope
Bank.

1883.
Sept. 27.
Oct. 2.
" 4.

In re Saber Bros.;
Miles vs. Deputy
Sheriff and Cape
of Good Hope
Bank.

up of the said goods to the applicant, as Receiver and Manager of the business of the said firm, through his duly authorised representatives, Messrs. Ross, Priest, and Page, accountants of Kimberley (see *Ross, Priest, and Page vs. Saber Brothers, supra*, p. 1).

The application was supported by the affidavit of Mr. J. H. Priest, who stated that, on July 26th last past, the applicant, Mr. A. O. Miles, had been appointed by the London Bankruptcy Court receiver of the business of Saber Brothers, and was ordered to "take immediate possession of such property"; that on August 1st the said Court had granted an order and request to this Court under section 74 of the Bankruptcy Act, 1869, asking this Court to recognise the appointment of Miles as Receiver and Manager of the said business; that on August 2nd the said Miles had appointed William Ross of Kimberley to represent him in the premises in South Africa by a power of attorney of which a copy was annexed, and thereafter the said Ross, by virtue of the power of substitution contained in the said power, had substituted the firm of Ross, Priest and Page to act in the premises on behalf of the said Miles; that application had been made to this Court on September 10th and on September 18th the Court, acting in aid of the London Court, had made an order recognising the appointment of Mr. A. O. Miles as Receiver and Manager of the business of Saber Brothers, carrying on business at London and Kimberley; that thereafter, in pursuance of the aforesaid orders, the deponent proceeded to take possession of the Kimberley assets of the said firm, but found that an attachment had been laid on them by the Deputy Sheriff at the instance of the respondent Bank; that thereafter, on September 20th, letters had been sent to the respondents requesting them to release the said goods from attachment, and enclosing copies of the order of Court, but to these letters no reply had been received and the attachment had not been removed. An affidavit was also filed by a member of the firm of Saber Brothers, to the effect that the Bank had obtained provisional judgment against the firm for the sum of £2688, on an acknowledgment of debt which the firm had given to the Bank on the manager undertaking to take no proceedings under the

judgment until the result of the former application to the Court was known; the manager however, in violation of this agreement and undertaking, had not only obtained judgment on the said acknowledgment but had also attached the property on September 15th, while the former proceedings were still pending and before the Court had given judgment. Mr. Ball, the Manager of the Bank, filed an affidavit in reply to this, denying the correctness of Mr. Saber's version of the arrangements with the Bank, who held a general bond over the assets of the firm; he had only undertaken to hold over the writ so long as he was advised that the interests of the Bank would not be prejudiced by that course; and on being subsequently advised that the receiver, if appointed, would probably be compelled to remit all moneys received from the business to the English creditors, whereby the Bank and the other local creditors would be greatly prejudiced, he was obliged to cause the writ to be put in force.

1883.
Sept. 27.
Oct. 2.
" 4.

In re Saber Bros.:
Miles vs. Deputy
Sheriff and Cape
of Good Hope
Bank.

Hoskyns, C.P., on behalf of the Bank, took a preliminary objection that the present applicants had no *locus standi*. The London Bankruptcy Court had given Miles no power to appoint an agent in this country, and in the case of receivers it was necessary for such power to be especially given; *Kerr on Receivers*, 2nd ed. 93; *Keys vs. Keys*, 1 Beav. 425. Without such special power no English receiver could appoint an agent to collect assets out of the jurisdiction. From the nature of the case it was clear that the London Court ought to have the appointment of the agent, subject to the approval of this Court, and the power of restraining the appointment. At present it did not appear under what jurisdiction Messrs. Ross, Priest and Page were supposed to come; not that of this Court, which had merely recognised the appointment of Miles, and to which they should have first applied for the recognition of their appointment as agents.

BUCHANAN, J.P.:—Miles did make the application. Ross, Priest and Page made the application locally, supported by a power from Miles.

Hoskyns, C.P.:—I don't know upon what grounds the

1883.
Sept. 27.
Oct. 2.
„ 4.

Court refused to recognise the appointment of Ross, Priest and Page.

In re Sabers Bros.:
Miles vs. Deputy
Sheriff and Capt
of Good Hope
Bank.

BUCHANAN, J.P.:—We made a very guarded order, leaving the matter as open as possible in view of future eventualities.

LAURENCE, J.:—The London Court did not ask us to recognise the appointment of Miles's agent, but of Miles himself.

Hoskyns, C.P.:—There is nothing to prevent Miles from coming here and doing the work himself. I submit that Ross, Priest and Page have no *locus standi* to bring the respondents into Court.

Forster (with him *Solomon*), in support of the application, referred to the order before the Court. The passage quoted from *Kerr* did not apply to receivers appointed under the Bankruptcy Act, 1869, but to those appointed by the Court of Chancery, which might exercise greater supervision where the case was one not of receiving and managing a business, but of winding up an estate. It was nowhere laid down that receivers under the Bankruptcy Act had no power of substitution; section 74 clearly contemplated the administration of bankrupt estates in various foreign countries at the same time, and it would be impossible for any receiver appointed under the sections of the Act applying to liquidation by arrangement to carry on the management of such a business unless he had a power of substitution. In the case quoted from *Beavan* there was a testate estate, wholly situated in India. In the present case it was the receiver, Mr. Miles, who was before the Court, and if he failed to appoint a proper person as agent he would be personally responsible to the London Court. Miles had been appointed receiver and manager of the business carried on at London and Kimberley, and was ordered to take immediate possession of the same, which he could not do without a deputy in South Africa. He referred to *Carron Iron Company vs. Maclaren*, 5 H. L., 436.

LAURENCE, J.:—Apart from this preliminary objection, the whole matter seems at present to be more or less in the air.

According to the ordinary bankruptcy procedure in England, I take it that the powers and functions of the receiver and manager would cease as soon as a trustee is elected. The Act seems to require the appointment of a trustee at the earliest possible moment, and we do not know whether that has been done in the present case.

1883.
Sept. 27.
Oct. 2.
" 4.
—
In re Sabers Bros :
Miles vs. Deputy
Sheriff and Cape
of Good Hope
Bank.

Forster :—In the ordinary case the liquidation would go on under the receiver and manager, and a trustee would not be appointed unless the liquidation by arrangement fell through.

LAURENCE, J. :—Then if there is no trustee and no adjudication there is no English bankruptcy, and what is there to prevent creditors from suing here and attaching the property ?

Forster :—There is nothing to prove that the office of receiver has terminated.

LAURENCE, J. :—But the appointment of a receiver is not an adjudication.

Forster :—The presentation of the liquidation petition was an act of bankruptcy, and the matter is within the cognizance of the London Court, which has made an order as to the property and practically placed its hands on the whole estate.

LAURENCE, J. :—A preliminary order.

Forster :—I do not think it can be described as a preliminary order.

LAURENCE, J. :—It may never proceed to final adjudication.

Forster :—But it amounts to an adjudication.

BUCHANAN, J.P. :—It is a voluntary liquidation by arrangement and not an adjudication. The Court intimated, when this matter was last before us, that we should require to be satisfied whether there has been an adjudication or not.

1883.
Sept. 27.
Oct. 2.
" 4.

In re Saber Bros.;
Miles vs. Deputy
Sheriff and Cape
of Good Hope
Bank.

Unless we receive notice of an English adjudication, I fail to see how we can make any order restraining the action of the local creditors.

Forster referred to section 125 of the Bankruptcy Act, 1869, sub-sections 1 and 7, and General Rules, 1870, 260, 261. He argued that a liquidation by arrangement was exactly the same thing as an adjudication, and that the office and functions of receiver must run on until the conclusion of the liquidation by arrangement. In view of the expressions of opinion from the Court, he would ask for the matter to be allowed to stand over, in order that information might be obtained from England by cable.

THE COURT accordingly, without ruling on the preliminary objection, postponed the further hearing until next motion day, and suggested that information should be obtained from England both as to whether the London Court had approved the appointment of the local agents, Messrs. Ross, Priest and Page, of the London receiver, and whether there had been any adjudication in bankruptcy, or any appointment of a trustee under the liquidation. The Court intimated that in the meanwhile the Sheriff would remain in possession but should take no further steps under the attachment.

Postea (Oct. 2).—

Forster produced a telegram from England stating that the London Court had confirmed the appointment of Ross, Priest and Page, as local agents of Miles, and that a trustee under the liquidation would be appointed on October 24th. He proceeded to argue that, while an English adjudication in bankruptcy attached all the personal property of the bankrupt wherever situated, a liquidation by arrangement and the appointment of a receiver had precisely the same effect. The goods of a debtor were protected from seizure by the Sheriff by the presentation of a liquidation petition, which was in itself an act of bankruptcy, capable of founding an adjudication, and therefore preventing the creditors, after the presentation of the petition, from attaching the property.

He referred to the Bankruptcy Act, sect. 125 and *Ex p. Duignan, re Bissell*, L. R. 6 Ch. 605, per Lord Hatherley, C. The principle was clear that in a case like this, where the Colonial law was silent, the English law must be followed. Here there is a notice to the execution creditor before the sale. As a trustee in liquidation is in the same position as a trustee in bankruptcy, so these proceedings date back to the presentation of the petition. The Court is really in possession of these assets and will not allow one creditor to obtain execution; whether adjudication supervenes or not really makes no difference.

LAURENCE, J., referred to *Roche and Hazlitt on Bankruptcy*, 2nd ed. 410, and *re Gregory* (14 S. J. 529) there cited, in which case "The Chief Judge said the receiver had no right to institute any proceedings, he was not a trustee, his duty was simply to collect the estate of the debtor, and he had no right to make himself a party to any proceedings."

Forster referred to *In re Chapman*, 15 Eq. 75. There a liquidation petition had been filed and a receiver appointed; and although the Court would not grant an injunction to restrain actions by creditors in New York, BACON, C.J., remarked:—"A receiver has been appointed who will take possession of the goods; consequently, if the actions against the debtors should be successful, the creditors in New York cannot attach them, and they are safe so far as the power of this Court can make them." He contended that the proceedings of the respondents were very like a contempt of the order of the London Bankruptcy Court, which had been recognised by this Court. This is not a proceeding such as a receiver cannot take, but an application to the Court to protect and enforce its own order; the Court will not allow the possession of its receiver to be interfered with or disturbed by anyone; *Kerr on Receivers*, 118, 124, 125. The respondents had disturbed the possession of the receiver, which dated back from the period of the application, and their action rendered the order of the Court invalid and useless. Receivers in bankruptcy were entitled to the protection of the Court equally with those appointed by the

1883.
Sept. 27.
Oct. 2.
" 4.
In re Saber Bros.:
Miles vs. Deputy
Sheriff and Cape
of Good Hope
Bank.

1883.
Sept. 27.
Oct. 2.
" 4.

In re Saber Bros.:
Miles vs. Deputy
Sheriff and Cape
of Good Hope
Bank.

Court of Chancery; *Robson on Bankruptcy*, 654. The proper course would have been for the Bank to wait for the order of this Court and then apply, if they thought fit, for leave to proceed; he referred to *In re Tait*, 13 Eq. 311; *Ex p. Rayner, re Johnson*, 20 W. R. 456.

Hoskyns, C.P., for the respondents, argued that the receiver had no *locus standi* to make this application or institute any proceedings of this kind except by leave of the Court or a Judge; *Kerr on Receivers*, 151; *anon. case*, 6 Vesey, 287. He admitted that if the Court had appointed a receiver to collect assets, it would be contempt for a creditor to oust him, but the respondent had not ousted the receiver, having obtained possession before he was appointed. It is true that at the time of this attachment the London Court had made this order; and if the respondent Bank were an English creditor, and a party to the liquidation proceedings, it might be amenable for contempt towards the English Courts. A receiver could not disturb an adverse possession previously acquired; *Kerr*, 128, and cases there cited. The possession of the respondent under the judgment was obtained on September 15th, and the local receivers at all events had no *locus standi* before the order of the Court of the 18th. This was really an attempt to anticipate the effects of adjudication. *In re Chapman* shewed the necessity for receivers to apply for leave to bring or defend actions, and that in cases of this kind injunctions would not be granted. If this is a case of conflict of laws, the Court will follow the laws of this Colony; he referred to *Burge*, iii. 912, and *Hunter vs. Potts*, 4 T. R. 182. By the law of this Colony there must be an actual sequestration to defeat an attachment; Ord. 6, 1843, sect. 22; and if the English law differs as to the effect of a voluntary agreement in transferring the property of the debtors to their creditors the colonial law must be followed. *Ex p. Duignan* was really an action by a trustee to set aside an undue preference; he referred to *Monk vs. Sharp*, 2 H. and N. 540.

Forster, in reply, referred to the remarks of Bacon, C. J., in *Ex p. Duignan*, 11 Eq. 613. If a receiver cannot take proceedings of this kind, no one can; clearly neither the creditors nor the debtor. The applicants had at all events

made out a strong case for an injunction till provisional day, the 25th inst., when there would be further information as to the appointment of a trustee. The important point here, as would appear from the remarks of the Chief Judge in the above case, was whether this execution had been levied in good faith, which he contended the circumstances shewed was not the case.

1883.
Sept. 27.
Oct. 2.
„ 4.

In re Saber Bros.;
Miles vs. Deputy
Sheriff and Cape
of Good Hope
Bank.

BUCHANAN, J.P.:—I am of opinion that this application, at all events at the present stage of the case, cannot be entertained. The respondent Bank is lawfully in possession of the goods in dispute as a judgment creditor, by virtue of the attachment which has been duly placed on the goods by the other respondent, the Deputy Sheriff. According to the law of this Colony, nothing but a previous sequestration in our Courts could have prevented the respondents from obtaining this attachment, and there has been no such sequestration. There may no doubt be a question whether, according to the Imperial Statute of 1869 and the general principles of bankruptcy law, a bankruptcy in England might not have a similar effect to a colonial sequestration; but so far as the information before the Court goes there has been no English bankruptcy, but merely an arrangement between the debtors and the English creditors; and it seems to me very doubtful whether such an arrangement can affect the rights and remedies of colonial creditors who were not parties to that arrangement. It seems to me that under the circumstances the Court can make no order on the present application; the respondent must have his costs.

LAURENCE, J.:—It appears to me that this application is both premature and *ultra vires*. No doubt the presentation of a petition for liquidation by arrangement, containing an allegation that the petitioners are unable to pay their debts, constitutes an act of bankruptcy, on which if necessary an adjudication may subsequently be based; but it by no means follows that an adjudication will take place. No doubt, too, under section 125 of the Bankruptcy Act, 1869, a trustee under a voluntary liquidation, when appointed, has substantially the same powers and duties as a trustee under an adjudication

1883.
 Sept. 27.
 Oct. 2.
 " 4.
 —
In re Saber Bros.,
 Miles vs. Deputy
 Sheriff and Cape
 of Good Hope
 Bank.

in bankruptcy ; but in the present liquidation we find that so far no trustee has been elected. Should a trustee be appointed, as it is said will be done on October 24th, it seems that his title would relate back to the presentation of the petition (*Ex p. Duignan*), and if in the interval the Bank sells these goods and receives the proceeds, the trustee on behalf of the creditors might be in a position to bring an action to compel the Bank to disgorge. What the result of such an action would be it seems at present unnecessary to discuss ; it is sufficient to remark that the Bank are responsible creditors, and if they choose, at their own peril, to sell these goods, it may be presumed that there will be no difficulty in ultimately recovering any damages for which they may be found to be liable. It seems to me clear that, whatever the powers of the trustee when appointed, the present applicant, the receiver, has no *locus standi*, no *persona standi in iudicio*, at all events without first obtaining leave from the Court for his intervention ; this is in accordance with the decision in *In re Gregory*, and the general theory of the legal position of such officers. The case might of course have been different if there had been an actual contempt of any order of this Court, which the applicant might in that case have properly brought to our notice ; but we cannot deal with any alleged contempt of the London Court ; and the attachment by the respondent was previous to any recognition of the applicant by order of this Court. As has already been pointed out, according to the ordinary principle and practice of our law, an execution sale would naturally follow on that attachment, unless a sequestration should in the interval supervene. I do not think, on the facts before us, that the applicant has made out his right to any special intervention from the Court, restraining the proceedings of the judgment creditor ; and I therefore concur in thinking that the application must be dismissed, with costs.

[Applicant's Attorney, CORYDON.
 Respondent's Attorneys, GRAHAM & GILBERT.]

BALL vs. KEEFER.

Provisional sentence.—Set-off.—Liability of endorser.—Custom of bankers.

B., the Manager of a Bank, applied for provisional sentence on a promissory note endorsed by K. in blank. K., at the time both of the dishonour of the note and of the action being brought, had funds in the Bank sufficient to meet his liability on the note. Held, that B. should not have sued K., but should have debited his account with the amount due by him on the note.

The plaintiff in this action, the Manager of the Kimberley Branch of the Cape of Good Hope Bank, claimed provisional sentence on a promissory note made in favour of the defendant or order, and by him endorsed in blank, of which the plaintiff was the legal holder, and which had been duly presented and dishonoured, of which due notice had been given to the endorser. The defendant made an affidavit in which he stated that he paid no attention to the notice of dishonour, as he had at the time, and still had, funds in the plaintiff's bank more than sufficient to meet the note, and any charges thereon, which he expected would in the ordinary course of business be debited to his account. On receiving a summons from the Magistrate's Court for the amount of the note, with interest and costs, he had offered to pay the amount of the note but without costs, at the same time informing the plaintiff that he ought to have debited the note to the deponent's account instead of issuing summons. The summons in question had subsequently been withdrawn and afterwards the present summons was issued, whereupon he had tendered the amount of the note, without interest or costs, which tender had been refused. The plaintiff then made an affidavit, substantially admitting the facts as set forth by the defendant, and alleging that it was not lawful or customary to debit the note to the account of the defendant, he being an endorser, without instructions to that effect. Payment had been demanded from the defendant after the usual notice of dishonour and before any summons had been served. The case had been transferred to the High Court as it was understood that the

1883.
Oct. 2.
" 5.
Ball vs. Keefer.

1883.
Oct. 2.
" 5.
—
Ball vs. Keefer.

defendant intended to raise legal points of importance which it was in the interest of all parties advisable should be decided in that Court.

Forster moved for provisional sentence.

Hoskyns, C.P., for the defendant :—This is a case to which the principle of *compensatio* according to the Roman-Dutch law applies. It is clear from *Pothier* and other authorities that as the plaintiff Bank owed Keefer money, Keefer's debt to the Bank on the due day of the note should have been set off, there being a liquid obligation on both sides, leaving the Bank indebted in the balance. It appeared that as soon as the defendant told the plaintiff to debit his account the summons in the Magistrate's Court was withdrawn, and there was no satisfactory explanation of this proceeding.

Forster, in reply, said this was a question of the custom of bankers; the distinction on which he relied was between the legal position and liability of the maker and endorser respectively. The maker knew that he was bound to provide for the note at a certain place on the due date, not so the endorser, whose liability was contingent on the maker's default. The Bank could not appropriate funds in these circumstances and would be liable to an action if they did; if the endorser failed to receive notice of dishonour, and afterwards drew a cheque for his full balance, and this was dishonoured, the funds having been applied in the interval to providing for the note, the Bank would be liable for the consequences. If an endorser's balance could be appropriated on the principle contended for, no notice to the endorser would be necessary as there would be no dishonour; the customers of Banks might be gravely prejudiced, as the Bank might appropriate the funds of one endorser and leave the balance of another untouched.

THE COURT intimated that as the plaintiff seemed to rely on the custom of bankers the case might stand over for three days, till the last day of term, for some information to be obtained on that point.

Postea (Oct. 5),—

Forster produced copies of a telegram which had been sent to the Managers of the Standard Bank and the Bank of

Africa at Port Elizabeth, stating the point involved, and of the replies which had been received. The latter declined to give an opinion upon a hypothetical case, stating that "Our practice entirely depends upon circumstances connected with case." The former replied:—"The maker of a promissory note having failed to pay it at maturity, the banker holding it is entitled to debit the same to the account of any endorser having funds at credit, either with or without special authority." He contended that the authorities did not go so far as to say that in a case of this kind the plaintiff was bound to appropriate; he might bring an action for a liquid debt even if he had funds of the debtor in hand. Moreover, if there was a liquid debt on both sides, the endorser was liable and could be debited on the due date; but notice of dishonour was essential by law and therefore this could not be done, and the proper course was to sue after notice had been given.

Hoskyns, C.P., in reply, referred to *Pothier* 1, 475. The law was clear and it appeared there was no custom of banking to the contrary; the custom seemed to be in entire accordance with the law, and if it were otherwise it would make no difference. Of course notice of dishonour had to be given before the liability of the endorser arose.

BUCHANAN, J.P.:—I was certainly at first disposed to think that there was a tangible distinction between the position of a maker and of the endorser in blank of a promissory note, and that, while the funds of the former would clearly be liable to appropriation in the event of his liability not being duly provided for, in the case of the latter it might be different, and it might be dangerous to give banks such a power of appropriation of the funds of endorsers as it is contended by the defendant they possess. On the whole, however, I think the balance of argument is in favour of the legal correctness of the defendant's contention, while the danger to which I adverted is really obviated by the necessity of notice of dishonour being given to the endorser before such appropriation can take place. I thought it right that the plaintiff should have an opportunity of producing some evidence, which might have weighed with the Court, that the custom of bankers was as he suggested: but

1883.
Oct. 2.
" 5.
Ball vs. Keefer.

1883.
Oct. 2.
" 5.
Ball vs. Keefer.

while he has produced no evidence of the custom of the head office of his own Bank, the opinion which he has obtained from the Standard Bank is against his view. On the whole therefore I think that, as it is admitted that the plaintiff had and still has funds in his possession belonging to the defendant sufficient to cover the amount of this note, and the charges consequent on its presentation and dishonour, he was not justified in suing on the note, and provisional sentence must therefore be refused, with costs.

LAURENCE, J.:—I take the principle to be clear that, if A. owes B. money and B. is indebted to A. in a larger amount, B. is not entitled to sue A., but should debit A. with the smaller obligation and credit him with the balance. Now, the liability of an endorser in blank to a holder for value is just as liquid as that of the maker; and knowledge on the part of the debtor, of who his creditor is, is legally immaterial; provided the two debts in fact simultaneously exist, the principle of *compensatio* applies. I agree in thinking that provisional sentence must be refused.

[Plaintiff's Attorneys, GRAHAM & GILBERT.]
[Defendant's Attorney, BEEVOR.]

DE BEER'S MINING BOARD vs. LIQUIDATOR OF BIRBECK DIAMOND MINING COMPANY, LIMITED.

Act 12, 1868, sect. 8.—Application for leave to sue Company in liquidation.

Leave granted to a Mining Board, under Act 12, 1868, sect. 8, to sue the official liquidator of a Company for rates imposed on the Company's claims subsequent to the winding-up order.

1883.
Oct. 2.
—
De Beer's
Mining Board vs.
Liquidator of
Birbeck D. M.
Co., Ltd.

This was an application for leave to sue the official liquidator of the Birbeck Diamond Mining Company, Limited, De Beer's Mine, for rates due to the applicants on the Company's claims, from and after the placing of the Company in liquidation. It appeared from the affidavit of the Secretary to the Board that the Company was placed in liquidation in March, 1883, that since then the sum of

£573 15s. had become due and owing to the applicants for rates imposed on the Company's claims, and that unsuccessful application had been made to the respondent for the payment of this sum.

1883.
Oct. 2.
—
De Beer's
Mining Board vs.
Liquidator of
Birbeck D. M.
Co., Ltd.

Lange, for the respondent, submitted that the Board's claim for rates was preferent by law on the assets of the Company, and this application was therefore unnecessary.

Forster, for the applicants, said this was an application under section 8 of Act 12, 1868. The preferent claim of the Board was for rates due at the time of liquidation, while this application was in respect of a debt which had subsequently accrued. A rate imposed after winding-up was payable in full; *Buckley on Companies*, 215, 328; *re Watson & Co.*, 52 L. J. Ch. 473; *re Dreyer's Estate*, Buch. 1868, 246.

THE COURT granted leave to the applicant to sue the respondent for rates accrued due to the applicant on the Company's claims subsequent to the placing of the said Company in liquidation; the costs of this application to be costs in the cause.

[Applicant's Attorneys, HAARHOFF BROS.
Respondent's Attorneys, GRAHAM & GILBERT.]

HARVEY vs. CRAWFORD.

Provisional sentence.—Deed of assignment.—Breach of conditions.

A debtor having assigned his estate for the benefit of his creditors omitted, contrary to the provisions of the deed of assignment, to schedule the claims of certain creditors, one of whom subsequently obtained judgment and attached part of the estate. Held, that, there having been a breach of the conditions of the assignment, it was no longer operative, and afforded no defence to a claim for provisional sentence by one of the creditors who was a party to the deed.

This was an application for provisional sentence on a promissory note for £503 11s. 6d. (less £25 3s. 6d. paid on

1883.
Oct. 5.
—
HARVEY vs.
CRAWFORD.

1883.
Oct. 5.
—
Harvey vs.
Crawford.

account) made by the defendant in favour of the plaintiff on May 19, 1883, and due two months after date. The defendant filed an affidavit in which he stated that on July 7th he made a deed of assignment in favour of his creditors among whom was the plaintiff, who was a party to the deed, in consideration of which assignment the plaintiff and the other creditors granted him a full release in respect of the debts scheduled, of which the present claim was one; the plaintiff had subsequently received two dividends of 6*d.* in the £ under the said deed. These facts were not disputed; but Mr. B. M. Woolan, the assignee under the deed, stated that the principal business of the defendant was that of a licensed canteen-keeper, that it was a condition of the deed of assignment that the defendant should give all facilities for the carrying on of the said business for the benefit of his creditors, that with the defendant's concurrence an application had accordingly been made for the transfer of the licence to the assignee, which had been refused, and that thereafter the deponent had applied at the half-yearly licensing Court in September for a new licence in his own name for the premises, but this had been refused in consequence of the refusal of the defendant, although requested thereto, to consent to the cancellation of the subsisting licence still held by him for the same premises, and this decision of the licensing Court had been sustained on appeal to the High Court. He further said that, besides the conduct of the defendant in regard to the licence, the deed of assignment was incomplete, as the defendant had failed to obtain the consent of all the creditors thereto, to wit, Messrs. Diering, Brophy and Cass, whose claims were not scheduled therein, one of whom, Diering, had subsequently obtained judgment and attached a portion of the assigned estate. In consequence of the premises it had been resolved at a meeting of creditors at which the plaintiff was present to consider the agreement with the defendant as null and void. He added that, in consequence of the refusal of the licence applied for, it had become necessary to close the canteen, and, although the defendant had paid Diering, he had failed to satisfy the claims of Brophy and Cass. In reply to this the defendant stated that his licence would not expire till March next and

he was and always had been willing to allow the assignee to carry on the business thereunder until its expiration, he himself remaining on the premises as by law required. He denied the alleged debt to Cass, and as to that to Brophy, he said that when he had dictated the names of his creditors to the assignee in order that their claims might be scheduled he mentioned that he was indebted to Brophy, but could not state the exact amount; he had moreover subsequently arranged with Brophy so as to free the assignee from any liability in respect of his claim. Mr. Woolan then made a further affidavit in which he contested the accuracy of the defendant's statements as to the canteen business and said he was advised that it would be illegal for him to carry on the business without a licence in his own name. He positively denied that the defendant had mentioned to him Brophy's claim as alleged, and said that it was not till long after the assignment had been executed that he received the claims of Brophy, Cass, and other creditors (of whom he annexed a list) not included therein.

Forster moved for provisional sentence.

Lange, for the defendant, argued that the omission of certain claims in the deed of assignment was fully explained by the affidavits. It was never contemplated that the defendant should retire from the premises and give up the existing licence. He had complied with all the conditions contained in the deed and retired from the conduct of the business in June. The contract of assignment contained a penalty if Crawford failed to disclose any creditor; in these circumstances non-disclosure did not avoid the contract but only rendered the defendant liable to the penalty. If Crawford omitted any creditor, he was to incur a penalty of £25, only receiving half the allowance of £50 per month which had been promised him, and it appeared from the affidavits that this penalty had been imposed. This was a very hard case, as the defendant had done his best for his creditors and they were now trying to make him insolvent.

Forster, in reply :—A deed of assignment does not extinguish the debt but merely suspends the remedy. This assignment was accepted on condition that the defendant

1883.
Oct. 5.
Harvey vs.
Crawford.

should give full particulars of all claims against his estate, and also that he should completely retire from the business, and give the assignee all facilities for conducting the same. There had been a breach of both these conditions. The assignment had been accepted "with all business licences," but the defendant had refused to cancel his licence, and so enable the assignee to obtain one in his stead. He had omitted creditors from his schedule, one of whom had subsequently obtained a judgment and attached the property. The conditions as to transferring the licence and retiring from possession could not legally be enforced till the September sitting of the Licensing Court; when the time arrived Crawford refused to give the assistance promised by the deed.

BUCHANAN, J.P.:—There are several points in this case on which there is a conflict between the parties as to the facts; but there is one point on which the allegations of the plaintiff are not denied, and which seems to me in itself decisive. It is admitted, whatever may be the case with regard to the claims of Brophy and Cass, that the contract of assignment did not include the name of one of the creditors, Diering, and that his claim was omitted from the schedule. This seems to be in itself a clear and sufficient reason for holding the deed of assignment, which contained a provision that there should be a full disclosure of all claims against the estate, to be inoperative. Not only was this so, but we find that Diering subsequently obtained judgment and attached portion of the estate which had been assigned for the benefit of the creditors. It is one of the clearest principles of these assignments that all the creditors should take part in them, and that not having been done the obligation on the promissory note must be held to have revived. Taking this view as to the effect of the first of the alleged breaches of the conditions of the assignment, I do not think it necessary to go into the question of the other alleged breach with regard to the licence and the arrangements for conducting the business on behalf of the creditors, which appear to have fallen through. The plaintiff must have provisional sentence, with costs.

LAURENCE, J., concurred.

[Plaintiff's Attorneys, HAARHOEF BROS.]
[Defendant's Attorney, BEEVOR.]

LONDON AND SOUTH AFRICAN EXPLORATION COMPANY,
LIMITED, *vs.* CREWELL AND COMPANY.

Interdict.—Clear right.—Irreparable damage.

A certain piece of ground partially under water was let to a firm of miners as a depositing site, but, as was alleged, without any permission or liberty to use the water, the exclusive right to which had previously been let to other parties for washing operations. On an application for an interim interdict to restrain the lessees, pending an action to be brought by the lessor, from using the water on the land demised,—Held, that as the right of the applicants was not altogether clear, and there was no sufficient proof of irreparable damage, the application for an interdict must be refused.

This was an application for an interdict to restrain the respondents from pumping, removing, and converting water from a certain natural basin or reservoir called “The Pan” situated upon the farms Dorstfontein and Benauwheidsfontein, the property and in the possession of the applicants, pending an action to be instituted for a perpetual interdict and damages. The application was supported by an affidavit of George Kilgour, the Company’s duly authorised attorney and agent, who stated that in October 1882, by a written agreement of which a copy was annexed, the Company leased to the respondents for the period of three years a certain piece of ground, about three acres in extent, situated on the farm Benauwheidsfontein and on the margin of “the Pan,” the whole of which was on the property of the Company. The deponent having observed that the respondents were pumping water from “the Pan” and converting the same to their own use without leave or licence from the Company, they had been called upon to desist forthwith, and pay compensation for the damage sustained, but without success. He added that in January 1881 the Company had leased, under an agreement which was still in force, the sole right of drawing water from the Pan to an Association called the

1883.
Oct. 5.

London & S.
African Expl. Co.
vs. Crewell & Co.

1883.
Oct. 5.

London & S.
African Expl. Co.
vs. Crewell & Co.

“Du Toit’s Pan Pumping Association,” and unless the respondents were interdicted from the proceedings complained of the applicants would suffer damage and be remediless in the premises. The lease annexed was on a printed form containing *inter alia* a clause giving the lessee the right to sink a well on the ground leased for the purpose of carrying on his mining operations, but not for the purpose of selling water or supplying the same to third parties; but this clause it appeared had been specially erased in the agreement with the respondents, who however stated that until this application was made they were unaware of the nature and purport of the clause which had been so erased. An affidavit was filed by Mr. Jacob Crewell, one of the respondents, who stated that most of the ground leased was covered by water and in fact formed part of the “Pan,” and it was mainly for the sake of the water, which was used by the respondents in their washing operations, that the lease had been entered into. He denied that the respondents were pumping water from any portion of the Pan outside the ground leased to them, and stated that an *interim* interdict would compel them to stop working and cause great loss and damage, while if the applicant succeeded in the action the respondents, who were in a good financial position, would be able to meet any damages they might be ordered to pay. In reply to this Mr. Kilgour made a further affidavit in which he stated that the ground was leased to the respondents, and was now used by them, for the purpose of depositing “tailings,” for which the slope into the water was an advantage, and made the site more convenient for that purpose; it was never intended to give the respondents any right of drawing water from the Pan, and this had been particularly guarded against in the form of the lease. The Company’s charge for each individual right of drawing water from the Pan, previous to the above-mentioned agreement with the Pumping Association, had been £200 *per annum*, and this was merely for drawing water without any acreage whatever; on the other hand the *minimum* charge for depositing sites without water was £15 per acre *per annum*, and the rent for the three acres leased by the respondents was at this *minimum* rate. He added that if the interdict were granted it

would not involve any stoppage of the respondents' work, as the tailings could be tipped and deposited on the ground leased without any inconvenience being caused by the water.

In reply to an allegation by Mr. Crewell that he (the deponent) had at one time offered Crewell's partner, now absent in England, a lease of another site, together with compensation, if he would cancel the existing lease, he admitted having offered another site in exchange for the present one, which he was still willing to give, if the respondents found the water an inconvenience, but denied that any compensation had been offered or applied for. At the suggestion of the Court, further affidavits were filed on each side explaining more in detail the exact nature and extent of the pumping operations complained of.

1883.
Oct. 5.
London & S.
African Expl. Co.
vs. Crewell & Co.

Hoskyns, C.P. (with him *Forster and Lange*), for the applicant, said that the water right in question was extremely valuable, and had been leased by the applicant at a high rental before the lease of the depositing site to the respondents. This site was partially under water but none the less useful on that account for the purpose for which it was obtained, namely the depositing of tailings, &c. The respondents had no right whatever to the water; according to their present practice and claim they would have the right to pump the Pan dry, and so cause irreparable damage. The rental paid for this site was at the *minimum* rate and therefore included no allowance for water, as also appeared from the circumstance that the clause as to wells in the printed form of lease had been expressly erased from the agreement. If the interdict were not granted, the applicant might be liable in very heavy damages for breach of agreement with the Pumping Association. The respondents were admittedly using the water for washing purposes, which was never intended, and for which the applicant Company received no compensation whatever. The tendency of English law was not to imply covenants or stipulations in written agreements which ought to have been expressed if intended; *Earl of Glasgow vs. Hurlst Alum Co.*, 3 H. L. 25; *James vs. Cochrane*, 7 Ex. 170, 8 Id. 556; *Woodfall on Landlord and Tenant*, 12th ed. 161, and cases there cited. The fact that the clause

1883.
Oct. 5.

London & S.
African Expl. Co.
vs. Crewell & Co.

as to wells was struck out of the lease was enough to put the lessee upon inquiry, and amounted to a constructive knowledge of its contents and effect. He would contend that, irrespective of agreement, a tenant had no right to erect a pump on land demised to him; the use of the water was not part of the use of the land; if the water were a nuisance he might have a remedy. The respondents, who were paying a *minimum* rental for a depositing site without water, now claimed a right to take water *ad libitum*. He referred to *Gale on Easements*, 5th ed. 139, and the case of *Lord d'Arcy vs. Askwith*, there cited. The water here was in the same position as the timber in that case; it was not a necessary easement for the purposes for which the lease had been granted to the respondents.

Davison, for the respondents, submitted that this was not a case for an interdict. The right was not clear, and the applicants would not be remediless. They could bring their action next term, within six weeks; and according to their own affidavits the value of a water right for that period would be about £30. The last clause of the lease contained a proviso for compensation, on the termination of the lease, for any wells which might have been constructed, and now it was argued that the lessees were impliedly prohibited from making them. The respondents claimed a right only to a limited amount of water, namely to that which covered their own site; the applicants could dam up the Pan all round those limits if they chose. One reason why this lease had been taken was on account of the water, which was essential to the respondents' operations, and was elsewhere difficult to obtain.

Hoskyns, C.P., replied.

THE COURT held that as the right of the applicant under the terms of the lease to the relief sought was not altogether clear, and there was no sufficient proof of irreparable damage, a case for an *interim* interdict had not been made out, and the application was accordingly refused with costs.

[Applicant's Attorneys, STOW & CALDECOTT.
Respondents' Attorneys, KNIGHTS & HEARLE.]

TARRY AND COMPANY *vs.* SOUTH WEST DIAMOND MINING
COMPANY. (a).

TARRY AND CO. *vs.* NORTH WEST DIAMOND MINING CO.
J. V. HOPE AND CO. *vs.* SOUTH WEST DIAMOND MINING CO.
HAMPSON AND CO. *vs.* SOUTH WEST DIAMOND MINING CO.

Provisional sentence.—Pactum de non petendo.

Provisional sentence granted on certain promissory notes, where the defendants set up an oral agreement to give time alleged to have been made before or at the time of the making of the notes sued upon, and where the plaintiffs alleged that such agreement was conditional upon the consent of all the creditors being given, and all had not consented.

The grounds of defence to claims for provisional sentence discussed.

In these cases the defendant Companies were summoned for provisional sentence upon a series of promissory notes dated July 18th, 1883, signed by the Chairman of the two Companies, who was duly authorised to sign on their behalf, the total amount claimed against the South West Company being £3704 8s. 8d. and that against the North West Company £4145 6s. 10d. The two defendant Companies had formerly existed as one Company under the name of the Cape Diamond Mining Company, and carried on their operations in the Kimberley Mine. After they became two Companies, they had the same Chairman, and the same Directors and Trustees. The defences set up to the claims for provision were the same in each case, except that in which J. V. Hope and Company were plaintiffs. It was agreed that the cases of *Tarry and Company vs. The South West Diamond Mining Company*, and *J. V. Hope and Company vs. The South West Diamond Mining Company* should be heard together, and that judgment in the other cases should follow the result in the case of *Tarry and Company vs. South West Company*.

1883.
Oct. 26.
Nov. 14.

Tarry & Co. *vs.*
South West
Diamond Mining
Co.

(a) [I am indebted to Mr. Justice JONES for the report of this case.—ED.]

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

The material facts were the following:—On September 26th, 1882, the trustees of the South West Diamond Mining Company passed and executed a notarial bond in favour of Messrs. Pistorius, Hull and R. M. Roberts, in their capacity as the trustees for the creditors of the South West Diamond Mining Company, acknowledging themselves to be indebted to the said trustees for creditors in the sum of £3960 8s. 2d., and specially hypothecating certain machinery, buildings, tools and other articles enumerated in a schedule annexed to the bond, possession of which machinery, &c., had been delivered to Pistorius, Hull and Roberts in their aforesaid capacity. The bond further set out that “whereas the Company are indebted to the several persons and firms mentioned in an annexed schedule in the respective sums of money set opposite to their names. . . . And whereas it has been mutually agreed between the said creditors of the said Company and the directors of the Company that the creditors should give it an extension of time for the payment of the amounts due to them respectively, and that in consideration therefor the chairman of the directors of the said Company should pass his promissory notes in favour of the several creditors for the respective amounts due to them, payable three months after September 18th, 1882, and should give to the said Pistorius, Hull and Roberts in trust for the said creditors the security of this bond as security for the due payment of the said promissory notes to be passed as aforesaid or any renewal or renewals thereof if renewed, and whereas it was further agreed that the Company should have the right to renew, should it desire it, any one or all of the said promissory notes to be passed as aforesaid for a further period of three months, beyond the respective due dates thereof, and that it should have the further right to renew any one or so many or all of such renewed promissory notes for a further period of three months beyond their respective due dates, etc., etc. . . . Now the condition of this bond or obligation is that if the said appearers in their said capacity, their successors, etc., shall and will well and truly pay or cause to be paid to the said trustees in their said capacity, etc., etc., or their assigns or the legal holder or holders thereof for the time being all and singular the

amounts of the promissory notes to be passed by them as hereinbefore mentioned, or any renewals thereof when and as the same become due," together with interest mentioned in the bond, "then this bond or obligation shall be null and void, otherwise the same shall be and remain in full force, virtue and effect." In the affidavit of J. B. Robinson filed by the defendants it was asserted that it was not within the power of the creditors to sue on the promissory notes before the Court while this bond was in full force and effect. This point, however, was not seriously pressed. On June 15th, 1883, Robinson's affidavit further alleged, a meeting took place between the Directors of the South West Diamond Mining Company and the creditors of the Company, including the plaintiffs, and it appeared by the minutes of the meeting that it was then agreed between those present that application should be made to the Cape of Good Hope Bank to take over the liabilities due to the creditors secured by the bond, failing which a further renewal of six months would be given. A copy of the minutes of the meeting, at which the deponent was not present, was attached to the affidavit. These minutes were subsequently confirmed by a meeting of directors of the Company on June 25th, 1883. Notes were passed by R. M. Roberts, Chairman of the Company, at one month's date in order to enable, it was said, the negotiations with the Cape of Good Hope Bank to take place, which negotiations however fell to the ground. The correspondence shewing this was annexed to the affidavit. The affidavit of Mr. Robinson then alleged that "he was advised and believed that in the circumstances" the Company was entitled to a renewal or to an extension of time for a period of six months from the date of the meeting on June 15th, 1883. The material portions of the minutes of the meeting were as follows:—

"Mr. Roberts stated that the bills given to the creditors under security of the machinery and plant fall due on the 18th instant and that the directors were not in a position to pay them and that this meeting had been called to consider what arrangements could be made concerning the same. The question of realising the machinery and plant was then discussed and it was considered undesirable to sell the same at present except such surplus stock as was not required, but the creditors considered that some portion of the rent received from the lessees should be paid to them; it was mentioned that Mr. Rudd had seen the manager of the Cape

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

1883.
Oct. 26.
Nov. 14.
—
Tarry & Co. vs.
South West
Diamond Mining
Co.

of Good Hope Bank and proposed that a portion of the interest to be paid to the Bank should go to the creditors, which had been agreed to, the proportion to be settled by a friendly referee, and that the amount at present to the credit of the trustees should be divided *pro rata* amongst the creditors.

“(2) Mr. W. T. Anderson was empowered to act in the place of Mr. Pistorius as trustee for the creditors, Roberts and Skill as directors consenting.

“(3) After discussion it was agreed to by these presents (*sic*) that the bills be renewed for one month for the purpose of negotiating with the Cape of Good Hope Bank for taking over the liabilities due to the creditors secured by the bond on the machinery, plant, etc., failing which a further renewal of six months would be given, *this to be without prejudice to the right of the creditors provided for in the bond.*

“(4) Messrs. Roberts and Skill agreed to all the foregoing *proposals* of the creditors which would be submitted to the Board of Directors for confirmation at their first meeting.

“(5) The solicitor was empowered to draw a fresh bond if necessary.

“(Signed) J. B. ROBINSON,
“Chairman.

“Confirmed at meeting of Directors held on 25th June, 1883.

“(Signed) J. B. ROBINSON,
“Chairman.”

The secretary of the Company wrote to the Cape of Good Hope Bank on June 20th, stating the proposal of the directors. In his letter the following passages occur:—
“One or two of the creditors were of opinion that no extension should be allowed. It was, however, ultimately agreed that before any decisive measures were adopted the directors be requested to bring this matter to your notice, you being the principal parties interested. . . . The directors are of opinion that your Bank could arrange with the creditors for a settlement of the liability at an early date, and as we believe that you are already the holders of the greater portion of the existing bills we are convinced there would be no difficulty in arranging for those not held by you.”
The Bank replied on August 8th, 1883, peremptorily refusing to take over the debts of the Company, and informing the trustees that as the plant and machinery were already in possession of the trustees they could deal with it as they thought fit.

J. Vernon Hope (Managing Director of Vernon Hope and Company, Limited), and one of the plaintiffs, distinctly

denied on affidavit having assented to any agreement giving an extension of time, or that he was present at the meeting; and Charles Dunell Rudd (the Chairman and Managing Director of the plaintiff firm of E. W. Tarry and Company) stated that, at the meeting referred to in Robinson's affidavit, "it was agreed amongst the creditors as stated in the said minute that in the event of the Cape of Good Hope Bank not agreeing to take over the liabilities of the Company the further time of six months be given, but that it was distinctly understood and agreed that this engagement should only be binding in case all the creditors consented thereto. That shortly after the above meeting he met J. V. Hope, who represented the firm of Hope and Company, creditors of the North West Company, who informed him that he would not consent to the extension of time proposed at the meeting. He added that when he learnt that the Cape of Good Hope Bank refused to take over the liabilities, and that J. V. Hope, on behalf of the firm of Hope and Company, had refused to give the extension of time, whereby the rights of creditors under the bond referred to in Robinson's affidavit would be prejudiced, he declined to give a further extension of time for the amount due to his Company. Cairncross, the secretary of the defendant Company, in an affidavit answering those of Rudd and Hope, admitted that Hope was not present at the meeting, but alleged that his firm had accepted a promissory note in accordance with the terms of the agreement between the creditors and directors "for one month for the purpose of enabling the defendant Company to negotiate with the Bank, and that thereafter he renewed this note for the period of one month less a certain *pro rata* share of certain debts, referred to paragraph (2) of the minutes of the meeting of the 18th June, as will be more fully seen by reference being had to the copy of the receipt signed by the creditors of the Company." This receipt, dated July 18th, 1883, had the following heading:—"We hereby acknowledge to have received the amounts placed (*sic*) our respective names being a distribution of £83 6s. 8d., which amount has been deducted from the bills due this day, the remainder being renewed one month." Below this receipt were written the names of the creditors, the amounts of their debts and the

1883.
Oct. 26.
Nov. 14.
Tarry & Co. vs.
South West
Diamond Mining
Co.

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

payments on account. Cairncross further stated that until he had perused the affidavits sworn by J. V. Hope and C. D. Rudd he had never "*in his capacity as Secretary to the defendant Company*" received any notice either from Hope or Rudd or any other person that Hope had refused to accept the arrangement come to at the meeting of June 15th, but on the other hand from the fact of the said Hope accepting a renewal at one month due on July 18th, and a further renewal at one month due on August 18th, together with payment of a *pro rata* share of certain debts referred to in the minutes of the meeting, he was always under the impression that he fully acquiesced in the arrangements and accepted the terms of the same. With regard to the second renewal, namely from July 18th to August 18th, he said that it was made at one month only and not for the full term of six months for the following reason, namely that Rudd suggested that as the defendant Company would probably be in a position to pay off a certain amount month by month, it would be better that the renewals should take place monthly in order to allow of such payments as the Company might be enabled to make, instead of taking one bill for the entire extension of time agreed upon, but that there was no condition to the effect that by granting a bill at one month the defendant Company should be obliged to pay anything on account or that it would disentitle the Company to a further renewal from time to time in terms of the arrangement of June 15th. He said further that he took down the minutes in the presence of the creditors and directors and read them over, and that no condition was made that they should be binding only in case all the creditors consented, but it was agreed that they should be binding on the creditors present. Owing to the absence of Rudd there was no answering affidavit to that of Cairncross.

Forster, on behalf of the plaintiffs, put in the promissory notes together with notarial protests, and prayed for provisional sentence.

Hoskyns, C.P. (with him *Davison*), for the defendant Company, contended that as there was an apparent acquiescence on the part of the plaintiff Hope, he certainly must be taken to have concurred with the other creditors -

accepting the agreement shewn in the minutes of the meeting of June 18th; that if he by his acquiescence had become a party to the compromise entered into between the defendant Company and its creditors, Rudd's contention entirely fell to the ground, as there would be a consent of all the creditors to the terms of payment proposed. If the minutes of the meeting were correct they shewed a distinct agreement to give time, and that therefore the plaintiff was not entitled to provision. It is not necessary to rebut the plaintiff's claim by a written document signed by the plaintiff.

Forster, in reply, contended that even if the agreement did exist the defendant Companies could not resist the claim for provisional sentence. The agreement, if made at all, was a mere verbal promise made at the time of the making of the promissory notes, and parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument. Moreover, it was not supported by any consideration. The verbal promise was, if given (which he denied), made at the time of signing the first notes, and could not apply to those which were made a month later, viz. on July 18th, and all the notes now sued on were made at that date. The circumstances under which they were granted were shewn by the receipt given on that date, which merely proved an intention to renew for one month. The question as to renewal and the extension of six months' time could not have arisen until about August 10th, as the letter of the Bank was not written until August 8th, while the renewals for the second month were accepted on July 18th. As to Vernon Hope, he was not present at the meeting and it is not shewn that he was even aware of what was done. He certainly never consented. He signed the receipt of July 18th, but this only shews his acceptance of a part payment of his note and renewal for one month. As to the nullity of any contemporaneous verbal promise to renew, *Simpson, N.O. vs. Frank and Nicolls* (2 Buch. E. D. C. 195) was a strong authority for the plaintiffs. A verbal promise to accept a renewal could not vary the written document. Before July 18th Hope had refused to consent to a renewal for six months, and therefore the condition that all the creditors should consent had not been fulfilled and none of the plain-

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

tiffs would be bound to renew. No mere verbal agreement to renew could be a good defence to a claim for provision. A written document was necessary.

Cur. adv. vult.

Postea (Nov. 14),—

BUCHANAN, J.P., in giving judgment, briefly stated the facts as above, and expressed a strong opinion that the affidavits produced by the defendants did not appear to him to warrant the Court in refusing provisional sentence. He was not satisfied that the defendant Companies had made out a case which would justify him in refusing the claims which the plaintiffs based upon the promissory notes put in. The defendants had not satisfied the Court that the probability of success in the principal case was against the plaintiffs. In this case it was unnecessary for him to discuss the questions which arose in the case of *Hoare vs. Graham* (3 Campbell, 57) or in the case of *Simpson N.O. vs. Frank and Nicolls* (2 Buch. E. D. C. 195). Without entering into the points discussed in that case he arrived at the conclusion that in the cases before the Court provisional sentence should be granted with costs. He had had an opportunity of reading the judgment about to be delivered by his brother JONES and concurred generally in the conclusions arrived at by him.

JONES, J.:—In all these actions the defendants are sued upon certain promissory notes signed upon their behalf, and duly put in and read by the plaintiffs' counsel. In answer to the claims founded upon the liquid documents the defendant Companies set up a plea which amounts either to a novation or an *exceptio pacti de non petendo*. It appears from the affidavits filed that the defendant Companies were in September 1882 suffering, as many other people still are, from the pressure of the times, and in order to relieve themselves from this pressure they passed on September 26th notarial bonds in favour of Messrs. H. F. E. Pistorius, George Henry Hull, and R. M. Roberts, as trustees for their creditors. Among these creditors, whose names and the amounts of their debts appear in schedules annexed to the bonds, are

the names of all the plaintiffs or their legal representatives. By these bonds certain property of the defendant Companies is specially mortgaged or pledged to the trustees to secure certain promissory notes to be passed by the chairman of the directors of the defendant Companies due three months after September 18th, 1882, or the renewals of the same. The defendant Companies were to have the right to renew for three months and the further right to renew for three months beyond the due dates of the renewals. This practically amounted to a grant of nine months time to the defendant Companies upon consideration of the creditors being secured by mortgage bonds in favour of certain three trustees. The Companies apparently availed themselves of their privileges, and renewed but did not pay their bills. On June 15th, 1882, when the nine months grace had passed, most of the creditors met again and determined upon attempting to persuade the Cape of Good Hope Bank to take over the liabilities due to the creditors—to pay them out in full in fact. Mr. Roberts seems to have informed the meeting that the notes passed were due, but the directors of the Companies were unable to meet their liabilities. Certain arrangements are then made as to interest and rent, changes are made in the trustees for the creditors, and then from the minutes of the meeting it appears that after discussion it was agreed that the bills be renewed for one month for the purpose of negotiating with the Cape of Good Hope Bank for taking over the liabilities due to the creditors secured by bond on the machinery, plant, &c., failing which a further renewal of six months would be given, but this to be without prejudice to the rights of the creditors provided in the bond. Mr. J. B. Robinson signs as chairman of the meeting. It is admitted that all the plaintiffs or their representatives were present at this meeting except Messrs. John Vernon Hope and Company. On the 25th of June, 1883, the directors formally agreed to these minutes. On June 20th, the Secretary of the North and South West Diamond Mining Companies wrote to the chairman and directors of the Cape of Good Hope Bank in Cape Town. Notes to run one month from June 18th were signed by the chairman of directors in favour of the creditors, and the Cape of Good Hope Bank having refrained from replying to the letter of

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

June 20th, the creditors accepted another batch of notes on July 18th, due a month after date, and at the same time signed a document which is in the following terms:—
“We hereby acknowledge to have received the amounts placed our respective names being a distribution of £83 6s. 8d. which amount has been deducted from bills due this day, the remainder being renewed for one month.” All the notes sued on are dated July 18th and are made payable one month after date. On August 6th the manager of the Cape of Good Hope Bank in Cape Town, having recovered from the shock of the letter of June 20th, replies in exceedingly indignant terms, refusing the offer of the secretary of the two defendant Companies to pay the creditors 20s. in the £ and take over all liabilities. These seem to be roughly the main facts of the case. Passing over for the present the nicer questions of fact which are raised by the affidavits of Mr. Rudd and Mr. Cairncross, I may at once deal with the law involved in the question before the Court. It is unnecessary to cite many authorities to support the doctrine laid down by Lord Ellenborough, in *Hoare vs. Graham* (3 Camp. 57). A defendant cannot give in evidence a parol agreement entered into when a note is drawn that it should be renewed and that payment should not be demanded when it became due. No mere oral agreement can have any effect at law in controlling the instrument, if *contemporaneous* with the making of it; for that would be to allow oral evidence to vary a written contract (*vide Byles on Bills*, p. 100). As PARKE, J., lays it down in *Abbott vs. Hendricks*, 1 M. and G. 795: “Every bill or note imports two things, value received and an engagement to pay the amount on certain specified terms. Evidence is admissible to deny the receipt of value, but not to vary the agreement.” In a case of *Pike vs. Street*, cited in *Byles*, p. 100, the opposite was held, and in *Abrey vs. Cruix*, L.R. 5 C.P. 37, Mr. Justice WILLES, a Judge of marked ability, doubted the principle, but it seems now to be deemed clear law. It is in fact merely applying to bills and notes one of the first rules of evidence. But though it is not competent to controvert or vary by parol the contract that appears on the face of the note, a contemporaneous agreement in writing may be adduced for that

purpose (*Brown vs. Langley*, 4 M. & Gr. 466, and *Bowerbank vs. Monteiro*, 4 Taunt. 844) or a subsequent written agreement (*McManus vs. Bark*, 5 L. R. Ex. 65). Similarly it was held in *Keyter vs. Vilgoen*, 1 Menz. 44, that parol evidence was inadmissible to invalidate the note by shewing that a certain agreement (referred to in the terms of the note) *ex facie* of the note unconditional was in reality conditional and its condition unfulfilled. In *Cannon vs. Ford* (1 Menz. 95), we have an instance of a defendant setting up a written agreement as a defence against a claim for provisional sentence on a promissory note. The plaintiff had signed a document stating that the defendant from loss of money he expected to receive was unable to pay for certain furniture bought from the plaintiff, and that the plaintiff thereupon engaged to wait till his claim was decided by the Orphan Masters, and if against the defendant to receive back the furniture, being paid for the hire of it. The Court held that this document had the effect of a *novatio debiti* and that under the conditions of the said engagement the plaintiff was not entitled to demand provisional sentence at that time. Where the defence of a *pactum de non petendo* was set up under the Dutch law it seems that the defendant would have been entitled to refer the question to the oath of the plaintiff (*vide Roux vs. Executors of Roos*, 1 Menz. 89 and *Voet*, 42, 1, 9 and 10) and as the oath of reference is retained by our Colonial law I suppose such a course would be admissible even under our present practice (Sect. 27 of Ord. 72). When this defence is set up and the defendant does not refer the matter to the oath of the plaintiff, the question arises as to what amount of proof he must give to avoid provisional sentence. In the able introduction of Mr. Justice WATERMEYER to the first volume of Menzies the general rule is laid down and *Van der Keesel* and *Van der Linden* followed. "The plaintiff's claim," says *Van der Keesel*, Thes. 527, "may be validly opposed by equally liquid proof on the part of the defendant not only in writing, but even by witnesses." "In order," says *Van der Linden* (*Judiciel Practyek*, vol. i. p. 207), "to oppose a decree of provisional payment, the defendant must be prepared with such counter proof as shall satisfy the Court that the probability of success is against

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

the plaintiff." Upon referring to Schorer's note to Grotius, B. 3. chap. 5, § 7, I find that he lays down the law as follows : "*Exceptiones autem solutionis, compensationis, novationis, pacti de non petendo, falsitatis, et quae his sunt similes, hanc adiudicationem non impedire, nisi in continenti probentur.* Sande, in his *Decisiones Frisicae*, (l. I. c. 8, § 3), writes :—*Exceptiones autem pro subiecta materia in continenti probari dicuntur, de quibus scripto publico vel privato in continenti appareat, et ita tribunalia ubique observant . . . : nec auditur debitor, qui per testes probare velit exceptiones propositas.* This rule seems to have been to some extent followed in *Levicks and Sherman vs. Eksteen* (1 Menz. 49). In that case there was, however, another ground for giving provisional sentence, as the defendant who was maker of a promissory note alleged a payment to the payee but did not clearly shew that it was before indorsation and delivery to the plaintiffs. On the other hand, an agreement to give time to the debtor was successfully set up by the defendant in the case of *Dobie vs. Lawton*, 1 Menz. p. 103, and the cases reported on the following pages against the same defendant; but in these cases the defendant produced a written document signed by the plaintiffs themselves or by those from whom they derived their title, and of this document the plaintiffs had notice at the time they acquired title. Upon looking through the reported cases during the last ten or twelve years it will be seen that the Courts of this Colony have exhibited a tendency to enlarge the narrow rule laid down by Schorer, and a more liberal view has been taken as to the nature of the defences which may be set up to a claim for provisional sentence. I need only cite the case of *Thornton vs. Brook* (Buch. Reports, 1873, p. 82) and the cases of *Raubenheimer vs. Campher* and *Keyter vs. Champion* (Buch. Reports, 1874) and *Piton vs. Executrix of Beyers* (Buch. Reports, 1876, p. 128). In the last mentioned case provisional sentence was prayed against the executrix of the deceased maker of certain promissory notes, and it appeared from the affidavits filed that accommodation paper had passed between the plaintiff and deceased. The defendant alleged and plaintiff denied that the notes were for the plaintiff's accommodation. DE VILLIERS, C.J., said "The affidavits have

raised a great doubt as to whether the notes were given for the accommodation of the plaintiff or the deceased ; and if the allegations made on behalf of the defendant are substantiated she must succeed. The Court must have both parties before it, before it can decide the issue of fact. Provisional sentence must therefore be refused." DENNYSEN, J., concurred and said, " The production of the promissory notes, containing a clear acknowledgment of debt, raises a presumption in favour of the holder ; but the allegations made in the affidavits set out a very strong case for the defendant." In *Piton vs. Beyers* the plaintiff eventually succeeded in the principal case. In all the cases, however, which I have cited the defendant's affidavits raised grave doubts in the mind of the Court as to the justice of the plaintiff's claim. The Court has now to consider whether the defence set up in the cases before it is of a character similar to that found in the cases cited. Upon one ground alone I think the plaintiffs ought to succeed. Looking at the affidavits filed by the defendant Companies I cannot say that I feel grave doubts as to the justice of the plaintiffs' claims. The minutes of the meeting do not appear to have been kept with very great accuracy, nor do they appear to have contained all the terms of the intended agreement. We are told that immediately after the meeting notes for one month, not six, are signed by the chairman, and yet if Cairncross be correct this would seem to be one of the terms of the agreement between the parties. No mention of it is made in the minutes. On the other hand Mr. Rudd swears that the agreement as to extension of time was conditional upon the consent of all the creditors being obtained. It is at least strange, if what Mr. Rudd says is untrue, that the renewals (according to the minutes) were "to be without prejudice to the rights of the creditors provided for in the bond." Now the condition of the bond was that upon non-payment of the renewals which were then already due the bond should be enforceable, and it is difficult to conceive that men of business would have placed themselves in such a position that any dissentient creditor—e. g. Hope—should have the whip-hand and be able to enforce his rights under the bond to the detriment of the other creditors. From the letter of the secretary of the defendant Companies

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

1883.
Oct. 26.
Nov. 14.

Tarry & Co. vs.
South West
Diamond Mining
Co.

we see that there were dissentients, and that the Cape of Good Hope Bank held many of the notes on June 10th. Surely it would have been an easy matter if the defendants' contention were correct to have obtained the signatures of the creditors to the arrangement alleged. Surely if it were intended that a further period of six months should be allowed to the defendant Companies, and that the notes given should be renewed every month, nothing could have been simpler than to have stated this in the minutes. It does not appear in the minutes, but the chairman of directors three days after the meeting signs promissory notes payable a month after date. The written undertaking given is inconsistent with the defence set up. While the chairman was signing these notes the minutes themselves—the alleged inchoate agreement—had not even been confirmed by the Board of Directors of the Company. But even after these minutes have been confirmed we find the chairman signing renewals of these same notes on July 18th. Even were the defence really good in law, I do not think it sufficiently clearly made out on the affidavits to raise grave doubts as to the validity of the plaintiffs' claims. But if this view were not correct this Court would not be justified in varying the terms of the written contracts of the parties by proof of the oral statements made at the meeting of June 15th. The mere production of a memorandum of the minutes of a meeting of creditors taken down by some person present—in this case the secretary of the defendant Company—subsequently confirmed by the directors of the defendant Company, cannot be deemed equivalent to the written documents mentioned in the cases I have cited. While it is true that the defence to a claim for provisional sentence is not required to be by a public or private instrument, it is equally true that a contemporaneous oral agreement cannot be allowed to vary the effect of the contracts in writing appearing in the promissory notes themselves. I concur in thinking that provisional sentence should be granted, with costs.

[Plaintiffs' Attorneys, HAARHOFF BROS.
Defendants' Attorneys, STOW & CALDECOTT.]

DELL, N.O. vs. OTTO.

Provisional sentence.—Summons.—Description of defendant.—

Fraud of indorser.—Bonâ fide holder for value.

A promissory note made by O. in favour of T. or order, and by T. and S. endorsed in blank, was previous to maturity passed by S. to a Bank as collateral security for an overdraft and other liabilities of S. to the Bank. It was alleged that at this time S. was a fraudulent holder of the note and was under obligation to return it to the maker, from whom he had already received payment. The Bank after dishonour sued the maker. Held, that the plaintiff, having had no notice of the alleged transactions between O. and S., was entitled to provisional sentence.

The description of a defendant by an initial in lieu of her second Christian name, followed by the full description of her husband, to whom she was married out of community, is not such a misdescription as to vitiate a summons for provisional sentence.

The summons in this case commanded "Petronella W. Otto married out of community of property to William James Otto, and by him assisted as far as need be, both of Kimberley," to appear to answer the provisional claim of the plaintiff, representing the Standard Bank, upon a certain promissory note bearing date July 31st, 1882, and payable March 31st, 1883, made by the defendant in favour of one Teubes or order and by him and P. W. Scholtz endorsed in blank, of which note the plaintiff was now the legal holder.

1883.
Nov. 15.
—
Dell vs. Otto.

Hopley, for the plaintiff, produced the note and the certificate of presentment and non-payment, and prayed for provisional sentence.

Forster, for the defendant, took a preliminary objection to the summons that there was not a sufficient description of the defendant, she being described merely as Petronella

1883.
Nov. 15.
—
Dell vs. Otto.

W. Otto, whereas her full name should have been given. He relied on *Norden vs. Hoole*, 1 M. 125; *Rens vs. Heydenryck*, 1 M. 124; *Malcher and Malcomess vs. Van Rooyen*, 2 E.D.C. 155; *Day's Common Law Procedure Act*, 1852, p. 2.

Hopley contended that the duty of the Court was only to see that the proper defendant was before it, and that there could be no mistake on that point. Here the defendant was so described that there could be no error as to her identity, and she had appeared by counsel. He quoted *Rens vs. Heydenryck*, *ubi supra*; *R. vs. de Villiers*, 1 M. 292; *Buck vs. Eksteen*, 1 M. 475; *Trustee of Nicholson vs. Coetze*, Buch. 1868, 239.

The Court overruled the objection, holding that the defendant was sufficiently described, and that the case was one in which there was no possibility of any mistake arising through the use of the initial.

The affidavit of the defendant was then read in which she stated that before the due date of the note she had arranged with the payee, Teubes, that she would release the note then in the hands of Scholtz, who had since died, by paying off another note of Teubes', for securing the payment of which Scholtz was then holding the note now sued on; that she accordingly did settle the note of Teubes, and that Scholtz promised to let her have her own note as soon as he could find it; that she frequently applied to Scholtz for the note, and only after his death discovered that it was in the hands of the plaintiff. This affidavit was supported by certain vouchers and receipts in the handwriting of Scholtz, and also by the corroborating affidavit of Teubes.

The answering affidavit of Dell was read stating that he had received the note in question from Scholtz, without notice of the facts alleged in the defendant's affidavit, before the maturity of the note and as collateral security for an overdraft and other liabilities of Scholtz, and that he had ever since held the note for valuable consideration, and only recently, and after maturity of the note, had been informed of the facts now alleged.

Forster contended that where fraud was set up as a defence to an action on a note, the holder could succeed only if he could allege that he had no notice of the fraud, and that he

was a holder for valuable consideration. He did not maintain that the plaintiff in this case had received notice, but he urged that there was no consideration. Where bills endorsed in blank or promissory notes are deposited merely by way of security, the property in them remains in the depositor, both as against the depositary and a third party with notice (*Grant's Law of Bankers*, 4th edition, p. 177). The note in this case was deposited as collateral security for Scholtz's liabilities; it was tainted with fraud in his hands; he could not have recovered on it, and as, by the above authority, the property in it never passed, the plaintiff could not now recover. Here the note was given as security for a past liability and no valuable consideration passed for it. This was merely a note given to the Bank for collection, and the property in it was not meant to pass to the Bank (*Grant*, pp. 145, 146).

1883.
Nov. 15.
Dell vs. Otto.

THE COURT, without calling on *Hopley*, granted provisional sentence with costs, holding that it was clear from the affidavits that the Bank was a *bonâ fide* holder for valuable consideration, and without notice of the alleged circumstances between Scholtz and the other parties liable on the note.

[Plaintiff's Attorneys, GRAHAM & GILBERT.
Defendant's Attorneys, KNIGHTS & HEARLE.]

DYMOTT vs. PIKE.

Arrest.—Peregrinus.

Can the Court confirm a writ of arrest obtained by one peregrinus against another peregrinus upon a liability which arose beyond its jurisdiction?—Not decided.

The Registrar had on the 2nd of November issued a writ of arrest against one W. S. Leslie and one H. R. Pike, upon the affidavit of T. W. Gilbert, the plaintiff's attorney,

1883.
Nov. 16.
Dymott vs. Pike

1883.
Nov. 16.
—
Dymott vs. Pike.

annexing the affidavit of the plaintiff, who resided in Cape Town, to which was annexed the following account:—

MASONIC HOTEL, CAPE TOWN,
24th October, 1883.

MESSRS. LESLIE & PIKE,

Dr. to W. DYMOTT.

Sept. 26.	To promissory note	..	..	..	..	£98	0	0
Oct. 25.	„ Mrs. Leslie's account	..	..	..	..	27	4	9
„	„ „ Pike's	„	..	..	..	27	5	6
„	„ „ Mr. Leslie	..	..	..	..	1	9	0
Cr.							153	19 3
Oct. 18.	Cash on account	..	..	..	..	15	0	0
							£138	19 3

Gilbert's affidavit further alleged that the debt was wholly unsecured, and that the defendants were about to remove to the Free State. Thereupon Pike had been duly arrested, but Leslie had left for the Free State. On the return day of the writ,

Lange prayed for its confirmation.

Levey read an affidavit by the defendant Pike, alleging that he and Leslie were members of a traveling troupe of actors who were simply passing through Kimberley; that he had no domicile in the Colony; that he had left his wife at Cape Town where he intended to join her on the completion of the traveling tour; that the indebtedness of the defendant, if any, arose in Cape Town beyond the jurisdiction of this Court; that he had not made nor signed the promissory note included in the account, and had not known of its existence till it was shewn to him by Mr. Gilbert, the applicant's attorney, and that he believed the note was made by Leslie solely. He denied any liability on the said note, and alleged that the £15 placed to credit in the account was a sum transmitted to the plaintiff by him in his own name and individual capacity on account of his personal indebtedness to the plaintiff.

Lange produced the answering affidavit of Mr. Gilbert, alleging that respondent had no fixed domicile in this Colony,

and intended leaving it as soon as the tour was over; that he had had frequent interviews with the two defendants about obtaining a settlement of the plaintiff's claim, and that they both admitted their liability; and that the respondent Pike saw the note in question and did not dispute his liability on it, and that both Leslie and Pike had admitted their liability to him personally but had pleaded inability to pay.

1883.
Nov. 16.
Dymott vs. Pike.

THE COURT was of opinion that the original affidavit, on which the writ was issued, did not shew that the present respondent was personally indebted to the applicant in a sum exceeding £15; and in the absence of any authority doubted whether they could confirm an arrest of one *peregrinus* at the instance of another *peregrinus*, upon a liability which had arisen beyond the jurisdiction, and accordingly discharged the writ, with costs.

[Applicant's Attorneys, GRAHAM & GILBERT.]
[Respondent's Attorney, DEWHURST.]

THOMSON AND COMPANY vs. GOODERSON.

Interdict.

Where the maker of a promissory note had pledged certain property as security for payment on demand of the amount of the note, and payment had been applied for but no steps had been taken to obtain judgment on the note, the Court, in the absence of clear proof that the pledgee would otherwise be remediless, refused to interdict the pledgor from parting with the goods.

This was an application for an interdict restraining the respondent from parting with certain property. It was founded upon the following document:—

1883.
Nov. 15.
" 16.
Thomson & Co
vs. Gooderson.

"CATHCART, KLEIN BOETSAP,
31st May, 1883.

"£200

"On demand I promise to pay Messrs. Thomson and Company or order the sum of two hundred pounds sterling

1883.
Nov. 15.
" 16.
Thomson & Co.,
vs. Gooderson.

for value received, for the security whereof and interest at the rate of one per cent. per month from date hereof, and of any other sum or sums due or which may become due by me to the said Thomson and Company, I hereby declare to have delivered and pledged erven numbers 117 and 118 with the buildings thereon, as well as all movable property such as tools, stock, &c., whereof I am the legal holder, and I engage and agree that in the event of the said sum of £200 and any other sums as aforesaid not being paid on demand, it shall and may be lawful for the said Thomson and Company or the legal holder to recover interest and principal or to sell and dispose of the said erven with buildings thereon, as well as any other property herein pledged, and in such manner as may appear most expedient, or so much of the said property as may be necessary for the said sum or sums with interest and to defray all expenses incurred by such sale, on condition that if there be any balance . . . it shall be paid over to me or my assigns, giving and granting as I hereby do to the said Thomson and Company or the said legal holder full power and authority in case of such sale to assign and transfer such erven to the said purchaser for which purpose I nominate the said Thomson and Company or the said legal holder my lawful attorney irrevocably so long as the said sum or any part thereof shall remain due, &c.

“(Signed) J. C. GOODERSON.

“Witnesses, J. WAGE,
C. KRUMEVICK.”

Upon the 18th of October, 1883, in Chambers (*coram* BUCHANAN, J.P.), on production of the affidavit of F. M. Thomson, one of the partners of the firm of Thomson and Company, annexing the said agreement, and setting forth that his firm, since May 31st, 1883, had made repeated demands on the respondent to comply with his undertaking but that he had failed to do so, or to deliver any part of the property pledged; that his firm had no other security for their debt; that the respondent was then selling portion of the property at a great sacrifice, and, as deponent believed, with the intention of defeating his firm in obtaining payment of their

debt; that his firm had received no proceeds of any sales of the property, and that unless an order were made interdicting the respondent from selling or parting with the property his firm would be remediless in the premises; a rule *nisi* was granted calling on the respondent to shew cause why he should not be restrained as prayed. The rule now came on for argument.

An affidavit was filed by the respondent in which he denied that he had disposed of any of the property referred to, or that he intended so doing, and alleged that he had only sold twenty-eight goats in September to enable him to live, he being at that time out of employment.

The answering affidavit of Thomson alleged that the goats were sold for half their value, and denied that they were sold merely to obtain necessaries of life, as his firm at that time was still supplying the respondent with goods on credit.

Forster, for the respondent, shewed cause:—The applicants are not remediless. They have a liquid document on which they could sue at any moment and get the property thereby pledged declared executable. Moreover there is no irreparable damage to the applicants, nor any intention on the respondent's part of doing any damage whatsoever.

Hoskyns, C.P., in support of the rule:—Where the right to be enforced is clear it is not necessary to shew that the applicants will be remediless, but an interdict will be granted if there has been a breach of contract by the respondent. The applicant is not confined to one remedy, but if he have two or more he may choose between them. Here he has chosen to come and ask the Court to stop the respondent from breaking his contract. The respondent being left in possession of the goods is in a fiduciary position towards the applicants and has no right to sell any part of the property to their detriment. The remedy of suing on the liquid document is available only on provisional days, and would in the circumstances of the present case be insufficient and inefficacious. He cited *Joyce on Injunctions*, vol. i. pp. 71, 74, 353, 354, 503; *Wood vs. Rowcliffe*, 3 Hare, 308 and 6 Exch. 407; *For vs. Seard*, 33 Beav. 327; *Hofmeyer vs. Hofmeyer*, Buch. 1875, 111. He contended that *Diamond*

1883.
Nov. 15.
" 16.
Thomson & Co.
vs. Gooderson.

1883.
Nov. 15.
" 16.
Thomson & Co.
vs. Gooderson.

vs. *Allpass*, Buch. 1879, 116, was not against him ; in that case the application was refused because the allegations in the respondent's affidavits to the effect that the proceedings had not been *bonâ fide* were uncontradicted.

BUCHANAN, J.P.:—I think the rule must be discharged, and on the authority of the last case cited, that of *Drummond* vs. *Allpass*, where in very similar circumstances the Court refused to grant an interdict. The allegations in support of the present application are very weak and it is not made out that the respondent will be unable to pay damages if he has done wrong ; and I think therefore that the parties may well be left to their ordinary remedy.

LAURENCE, J.:—*Van der Linden* lays down clearly the three requisites which an applicant for an interdict must be invested with. Here the applicants are not remediless, but on the contrary have a prompt and efficacious remedy. There is nothing to shew that the respondent is without other means, except perhaps his own statement in his affidavit that he had to sell part of the stock pledged for the purpose of procuring the necessaries of life ; but that is scarcely sufficient, and being an admission of the respondent's it should not be strained against him. A "clear right" in itself is not always sufficient to induce the Court to grant the extraordinary process of an interdict. If it were so applications for interdicts would become far too common. The true test seems rather to be whether the ordinary remedy by action would or would not be a sufficient one, and in this case there is no satisfactory evidence that it would be insufficient.

Rule discharged accordingly. With regard to costs the terms of the order in *Drummond* vs. *Allpass* were followed.

[Applicants' Attorneys, GRAHAM & GILBERT.
Respondent's Attorneys, HAARHOFF BROTHERS.]

Re ALLIANCE DIAMOND MINING COMPANY, LIMITED.

*Joint Stock Company.—Act 12, 1868.—Duties of liquidators.
—Secured creditor.—Liquidation must be prompt.*

The Alliance Diamond Mining Company, Limited, had been placed in liquidation in September 1882, and A. Goldschmidt and H. J. Feltham had been appointed joint liquidators, with power to sell the assets of the Company. After waiting for some time, during which no rise in the selling price of the assets of the Company took place, it was agreed by the liquidators that as one of them, Goldschmidt, was then about to visit Europe, he should try to negotiate a sale on advantageous terms there. He did go to Europe, in May 1883, but had not succeeded in opening any negotiations there for disposing of the assets. The Bank of Africa, which was a secured creditor of the Company for £2893, having frequently pressed the remaining liquidator to realise the assets, he caused the sale of the property of the Company by public auction to be advertised on September 19th for November 9th, 1883.

1883.
Nov. 8.
" 16.
" 22.
—
*Re Alliance
Diamond Mining
Co.*

On November 8th, 1883,

Hopley applied in Chambers (*coram* BUCHANAN, J.P.) for a rule *nisi* restraining the sale, and produced the petition of creditors to the amount of £9616, which set forth that a sale by public auction at that date would be highly detrimental to their interests; that negotiations were at that time going on in England which, if successfully concluded, would result in the payment of all the Company's liabilities, and that it was believed by the petitioners that a postponement of the sale until January, 1884, would be beneficial to their interests.

After hearing *Forster* for the Bank of Africa, the Judge granted a rule *nisi* returnable on November 15th calling on all persons concerned to shew cause why they should not be restrained from selling, &c., the assets of the Company; the rule to be advertised and to operate as an *interim* interdict, the applicants to pay the expenses incurred in adver-

1883.
Nov. 8.
" 16.
" 22.
—
Re Alliance
Diamond Mining
Co.

tising the sale. This rule came on for argument on the 16th of November, when

Hopley prayed that the rule be made absolute and urged that the Court ought to consider the wishes and interests of the creditors for nearly £10,000 rather than those of the Bank of Africa, a creditor for less than £3000, the payment of which was secured, so that except the delay no damage could accrue from the postponement.

LAURENCE, J.:—Is not the position of the Bank analogous to that of a secured creditor in insolvency who, under Section 56 of the Ordinance, can prevent the trustee from interfering with or injuring his rights?

Hopley:—In a private insolvency the secured creditor has a right to compel a sale of the property mortgaged, but in liquidation there is no similar right given by the Act.

Forster, for the Bank of Africa, professed the readiness of his client to withdraw his opposition to the present motion if the payment of the debt to the Bank were guaranteed, but submitted that they should not be kept out of their money any longer. The liquidation had been going on for about fourteen months and no progress had been made.

THE COURT, wishing for an affidavit from the liquidator, Mr. Feltham, adjourned the matter for that purpose.

On the 22nd November, Mr. Feltham's affidavit was produced, stating that his co-liquidator was trying to negotiate a sale of the assets in England, but, he thought, without any chance of success; he thought, however, that if there were any chance of such negotiation going through it would be inexpedient to sell at the present time by public auction; at the same time, on general grounds, he saw no reason to suppose that the assets would command a better sale in January 1884 than at the present time, nor could he fix any time at which such a rise in value could be reasonably anticipated.

THE COURT did not consider that sufficient cause had been shewn to postpone the sale any further. The Company had

been in liquidation for considerably more than a year and nothing had been done towards finally winding it up. Liquidators should be as prompt as possible in realising assets, and creditors should not be kept waiting for their money in hopes of a better state of things at some uncertain date. The rule was therefore discharged and the costs were ordered to be costs in the liquidation.

1883.
Nov. 8.
" 16.
" 22.
—
Re Alliance
Diamond Mining
Co.

[Applicants' Attorneys, GRAHAM & GILBERT.
Respondents' Attorneys, STOW & CALDECOTT.]

QUEEN vs. NAIGET.

Contravention of Wine and Spirits Ordinances (Griqualand West).—Holder of licence.—Trustee of insolvent licensee.—Ordinance 16, 1879, sect. 51.—Ordinance 19, 1880, sections 5, 11.

Where an insolvent, the holder of a licence to sell wines, &c., left his licensed premises in the hands of his trustee, who continued the business but did not procure a transfer of the licence into his own name, and thereafter an illicit sale of spirits took place at the premises by a servant in charge:—Held, that the insolvent was not responsible for such illicit sale.

This was an appeal from a conviction by the Police Magistrate of Kimberley. The summons charged the accused with having on Sunday, October 21st, 1883, contravened section 5 of Ordinance 19, 1880 (G.W.) in that on that date he did by himself or his agent, then being on his licensed premises, sell sixpence worth of brandy to one Jim, the said Naiget not being duly licensed to sell, deal in, or dispose of wines, &c., on Sunday, as by law required. The evidence taken before the Magistrate shewed that the prisoner had been duly licensed for the year 1883 to sell wines, &c., at stand No. 352 at Kimberley on week days only. In July 1883 his estate was sequestrated and the petitioning creditor, one Diering,

1883.
Nov. 16.
—
Queen vs. Naiget.

1883.
Nov. 16.
Queen vs. Naiget.

was duly appointed trustee. The trustee forthwith took possession of the premises, and from that date prisoner had nothing to do with the conduct of the business, nor was it proved that he had been on the premises since the trustee took possession. The licence, however, was never transferred, and on Sunday, October 21st, 1883, was still in the prisoner's name. On that day one Jim (a native trap) went to the canteen and bought some brandy for the sum of sixpence. He was served by one Garrett, and the prisoner was not present. On October 23rd the trustee applied for a transfer of the licence, and it was at once transferred to his name.

The Magistrate convicted the accused and fined him £5 1s. or in default of payment sentenced him to 14 days imprisonment.

Hopley, for the appellant:—By the 51st section of Ordinance 16 of 1879, a licence to sell wines, &c., was recognised as an asset in the estate of an insolvent licensee, and the transfer of the licence to the trustee is provided for. Thus upon the insolvency of the prisoner in July this asset vested in and became the property of the trustee, Diering, who acting on his powers took possession of the licensed premises and turned the insolvent out. As the canteen business was continued by the trustee it was his duty to get the licence transferred to his name. All that would have been necessary was an application to that effect and the transfer would have followed as a matter of course. In fact even after this breach of the law no difficulty was made by the authorities, for the transfer was granted on October 23rd upon the trustee's application. The applicant had been totally unconnected with the business for three months and had had no control whatever over it. He must not be presumed to have known that the trustee had not taken the necessary steps for the transfer and was acting illegally. The applicant had no interest in contravening the law, and risking the penalties imposed, for the benefit of his creditors. Even in civil cases the mere fact that property upon which a debt arises is registered in a defendant's name is not conclusive against

him (*Thode vs. Van der Hoeven*, Buch. 1869, 298), and *a fortiori* he would not be held criminally liable. Here Garrett, who must be taken to be the trustee's agent, had contravened the law. Section 11 of Ordinance 19, 1880, certainly does make the holder of any retail licence responsible for an illicit sale of liquor, but only "until the contrary appears." Here the contrary did plainly appear and the conviction ought to be quashed.

1883.
Nov. 16.
—
Queen vs. Naiget.

Hoskyns, C.P., contended that setting aside the conviction might open the door to innumerable frauds on the part of trustees, as there was no provision in the Ordinances to punish them while the licence stood in the name of the person whom they represented. Section 11 of Ordinance 19, 1880, shewed the licensee that he was responsible as long as the licence stood in his name, and upon his insolvency it was his duty to see that due transfer was made to the trustee. The words in that section "until the contrary appears" throw the onus of proving that he had nothing to do with the sale upon the holder of the licence. Here the appellant ought to have proved at the trial that Garrett was not his but the trustee's servant, which he had not done.

THE COURT held that it appeared that the appellant had been for a long time unconnected with the business, which had meanwhile been carried on for the benefit of the creditors by the trustee, who had taken possession of the premises, and that consequently in this case, as "the contrary appears," the holder of the licence ought not to be held responsible for the illicit sale of the liquor; and accordingly quashed the conviction.

[Appellant's Attorney, COCHLAN.]

PARK vs. BANK OF AFRICA.

Building Contract.—Architect's Certificate.—Pleading.—Reference in plea to general conditions of contract annexed.—Issuable plea.—Claim in reconvention.

In an action on a contract the defendant's plea should state specifically the portions of the contract on which he relies, and should explicitly allege the breach or non-performance of the same. A plea of set-off if defective through being vague and embarrassing is not cured by a more explicit statement of the nature of the alleged set-off contained in a claim in reconvention. An order to plead issuably does not debar a defendant from setting up a counter-claim arising out of the contract on which the plaintiff sues.

1883.
Nov. 20.
" 22.

Park vs. Bank of
Africa.

This was an action on a building contract. The declaration set forth that in November 1882 the plaintiff, a builder and contractor at Kimberley, where the defendant also carried on business, agreed to do certain work specified in a written contract in and about erecting certain bank buildings at Bloemfontein to the satisfaction of the defendant's architects, Messrs. Jones and Moir, to be certified in writing, for the sum of £3650, eighty per cent. of the value of the work done to be paid from time to time on certificates from the architects, and of the remaining twenty per cent. three-quarters to be paid on the final certificate of the architects, and the balance two months after such final certificate; that it was further agreed that the architects should be at liberty to vary the dimensions, &c., of the work without vitiating the contract, and that the plaintiff, in pursuance of such directions as he might receive in writing (but not otherwise) from the architects, should execute such orders, and the difference of cost thereby occasioned should be paid for, and in case of any dispute should be ascertained by the architects, and the amount should be added to or deducted from the contract price; that in pursuance of such agreement the plaintiff did certain extra work amounting to the sum of £389, and had also completed the whole of the work to the satisfaction of

the architects, and had received payments amounting in all to £2914; that on May 26th, 1883, the architects had certified in writing that £700 was due to the plaintiff for the said work; that there was now due on account of the work and extras a balance of £1125 and all conditions were performed, &c., yet defendants had not paid the same. A second count in the declaration was in similar terms and referred to a contract entered into between the same parties for erecting a bank building at Kimberley for the sum of £4000. The same architects were mentioned and they had similar powers about alterations, &c. On this contract the sum of £855 was charged for extras, besides which the whole work had been completed to the satisfaction of the architects, as certified by them in writing, and payments in all to the amount of £3778 had been received on account. The architects had in August 1883 duly certified that the sums of £855 and £222, the balance of the contract price, were due to the plaintiff and all conditions had been performed, &c., but the defendants refused to pay these amounts. The plaintiff claimed £2102, with interest and costs.

By a previous order the defendants had been ordered to plead *issuably* within a certain time. The defendants' plea admitted the contracts and the 3rd paragraph thereof was as follows:—"As to paragraphs 3 and 8 of the declaration" (these being the paragraphs alleging the architects' power to vary the contracts by ordering extras, &c.), "the defendants "admit the terms of the said agreements therein set forth, "but they say that there were certain further conditions "appended to those portions of the agreements set forth in "the said paragraphs. The conditions herein referred to "formed conditions precedent to the right of the plaintiff to "recover any sum or sums for extras under the said contracts, "as will more fully appear on reference to the general conditions of the said contracts, copies of which are annexed "hereto and which the defendants pray may be considered "as inserted herein." The defendants then proceeded to deny the paragraphs of the declaration which alleged that the plaintiff did the extra work under the two contracts for the sums of £389 and £855. They admitted the payments on account by them of the sums alleged in the declaration

1883.
Nov. 20.
" 22.

Park vs. Bank of
Africa.

1883.
Nov. 20.
" 22.

Park vs. Bank of
Africa.

but denied the completion to the architects' satisfaction as certified in writing. They admitted the architects' certificate for £700 under the Bloemfontein contract but denied the performance of all conditions, &c., necessary to entitle the plaintiff to payment and denied the amount claimed as balance due. They denied that the architects' final certificate had been given on the Bloemfontein contract, and also the rest of the paragraph relating to the performance of conditions, &c., and the balance due as alleged. They alleged that on the 26th of May and in the month of August, 1883, there were due in respect of the contracts not more than 80 per cent. of the sums payable under them, and that sums in excess of such 80 per cent. had been paid to the plaintiff; that they were entitled to retain 20 per cent. of the contract prices until final certificates had been granted by the architects, which had not been done up to the date of the summons in the case, by reason of which the plaintiff was not entitled to be paid the sums claimed by him in the present action or any part thereof. The 9th paragraph of the plea was as follows:—"As an alternative defence to the sums claimed "for extras under the said contracts the defendants say that "by the terms of the said general conditions annexed hereto "it was agreed by and between the plaintiff and defendants "that no allowance would be made for extras unless the "orders for such extras were given under the hands "of the architects and charged for within one calendar "month of such orders, and the defendants say that the "plaintiff is not entitled to recover the sums claimed by him "in respect of the said extras because the orders for the said "extras were not given under the hands of the said architects "nor were the said extras charged for within one calendar "month of such orders." The 10th paragraph, as a further alternative defence, denied that the items charged for were extras, but alleged that they were included in the original plans and specifications. The 11th paragraph was as follows:—"And as a further alternative defence to the claim "for the said extras the defendants say that if the plaintiff is "entitled to claim any sum on account of any work whether "included or not in the plans and specifications under the "said contracts or any or either of them, yet that the

“plaintiff is indebted to the defendants in a much larger sum, under the terms of the general conditions annexed hereto, and otherwise, than is due by them to the plaintiff in respect of matters arising under their said contracts, to wit; the sum of £250 in respect of the said contract for the said Bloemfontein building and £613 in respect of the said contract for the said Kimberley building.”

1883.
Nov. 20.
„ 22.

Park vs. Bank of Africa.

Then followed this claim in reconvention:—

1. “For a claim in reconvention the defendants crave leave to repeat the allegations stated in the 11th paragraph of their plea.

2. “Owing to the bad workmanship and negligence and delay of the plaintiff in erecting and completing the said buildings at Bloemfontein and Kimberley as aforesaid the defendants have been put to great expense in providing other labour and material in completing and altering the buildings and have otherwise been put to great expense, and been greatly injured and damaged to the extent of £250 in respect of the Bloemfontein building, and in respect of the Kimberley building to the extent of £113 9s.

3. “The plaintiff is further indebted to the defendants in the sum of £499 15s. for moneys advanced by the defendants to the plaintiff at his request and overdrawn by the plaintiff in the books of the defendants in the Kimberley Branch of the defendant Bank.

“The defendants claim £863 4s. with interest and costs.”

Thereupon the plaintiff applied to the Court to strike out paragraphs 3 and 11 of the plea and the whole claim in reconvention as being vague and embarrassing, and further, in respect of the claim in reconvention, on the ground that it was not in accordance with the interlocutory order to plead issuably.

Hoskyns, C.P. (with him *Belgrave*), in support of the application, contended that as to paragraph 3 it was vague and embarrassing and insufficient. The particular conditions upon which the defendants relied as being conditions precedent should be set forth. There were no conditions “appended” to the conditions set up in the declaration which the 3rd paragraph of the plea admitted, but which

1883.
Nov. 20.
" 22.

Park vs. Bank of
Africa.

contract was annexed to the plea and the plaintiff was expected to search through it to ascertain on what particular conditions the defendants relied. Moreover the plea merely alleged the existence of certain conditions precedent without setting forth that there had been a breach of such conditions. As far as could be gathered the breaches referred to in paragraph 3 were the same as those mentioned in paragraph 9 of the plea, which sets up an alternative defence. As to paragraph 11 it was most embarrassing and ambiguous. What was meant by the allegation that "the plaintiff was indebted to the defendants in a much larger sum under the terms of the general conditions annexed *and otherwise*," and how could such a plea be answered? It was apparently a claim for damages, in which case it was not an issuable plea, and moreover it was at variance with the claim in reconvention, where it was incorporated by reference, for there £499 was claimed not as damages for negligence but as money advanced. While this paragraph was vague and irregular, the claim in reconvention was even more so, for it incorporated paragraph 11 and at the same time contradicted it. Furthermore it was not issuable. The defendants were ordered to plead issuably and could not introduce new matter by a claim in reconvention, but ought to plead so that issue could at once be joined.

LAURENCE, J.:—What is the meaning of "pleading issuably?" Does it not merely mean that the plea must be to the issue and that there must be no exception or plea in abatement?

BUCHANAN, J.P.:—Practically, what is there in the claim in reconvention to prevent issue being joined and the case being heard this term?

Hoskyns, C.P.:—We may set up as a defence the architects' certificate and then they would plead specially to that, which would throw the case over the term. As to the meaning of "an issuable plea" he referred to *Wharton's Law Lexicon*, *sub voce*. The plaintiff could not join issue on a claim in reconvention.

Forster (with him *Levey*), for the defendants, admitted that the pleas, which were drawn hurriedly, might have been better in point of form, but contended that they were good enough and clearly disclosed the nature of the defence. It was intended by the order to plead issuably that the defence on the merits should be truly and concisely stated, but not that the defendant should be barred from raising a counter-claim. The claim in reconvention was a simple recapitulation of paragraph 11 of the plea with the addition of specific statements explanatory of its meaning; and there was no variance because the overdraft referred to was in connexion with the Kimberley contract. Paragraph 11 could not be embarrassing since the set-off therein pleaded was explained by the counter-claim. As to paragraph 3 the further conditions were to all intents set forth since the defendants annexed to it all the conditions of the contract. Paragraph 7 denied that all the conditions had been fulfilled, as alleged in the declaration. The proper course would have been for the plaintiff to apply to the defendants for particulars in regard to any portion of the plea he might find ambiguous, instead of asking the Court to strike it out.

Hoskyns, C.P., replied.

BUCHANAN, J.P.:—Although in some particulars my learned brother and myself are not entirely agreed as to our reasons, we are both of opinion that this application must be allowed, and that, with one exception, the objections which have been raised to the defendants' pleading must be sustained by the Court. I shall state my view of the matter very briefly. With regard to paragraph 3 of the plea, I find that the defendants appear to rely upon certain portions of the general conditions of the agreements entered into with the plaintiff, which they say have not been set forth in the plaintiff's declaration, but will be found on reference to the general conditions, which are very long and elaborate, and which are annexed to the plea. Although it may not be necessary for the contract, in a case like this, to be set out in full, a course which has not been adopted by the pleader on either side, still it is obviously desirable that those portions on which the parties rely should be clearly

1883.
Nov. 20.
" 22.

Park vs. Bank of
Africa.

1883.
Nov. 20.
" 22.
Park vs. Bank of
Africa.

stated in the pleading. The plaintiff has done so for his part, and I think that the defendants should have done the same instead of merely referring to them, whether as "appended" or otherwise, and on this ground I am content to rest my decision that paragraph 3 of the plea is, in its present form, vague and embarrassing and must therefore be struck out. The objection which has been taken to paragraph 11 I also hold to be well founded, and on similar grounds. The defendants say that "the plaintiff is indebted to the defendants in a much larger sum under the terms of the general conditions annexed hereto, and otherwise, than is due by them to the plaintiff in respect of matters arising under their said contracts." These words "and otherwise" might include any possible cause of action and are certainly vague and indefinite in the extreme. It is said that the plaintiff might have applied for "particulars"; but I do not know that there was any obligation on him to adopt that course. It was the duty of the defendant, especially considering the terms of the previous order, to set forth the nature and grounds of his defence in clear and specific terms, and not to employ embarrassing generalities of this kind. As to the objection to the claim in reconvention, I am of opinion that the defendant was not precluded from raising any claim of that kind, which he might fairly have against the plaintiff, by the terms of the order to "plead issuably"; but at the same time paragraph 3 of that claim in its present form cannot stand, as is clear from the fact that counsel for the defendants has been obliged in his argument to offer an explanation of its meaning, and of the apparent inconsistency between it and paragraph 11 of the plea, of which it purports to be itself a sort of explanation. This however should have appeared on the face of the pleading. It is admitted that these pleadings were drawn in a limited time and under pressure of other work, and I have sufficiently indicated the points on which they appear to me to be inadequate and to require amendment. The application must therefore be allowed, with costs; but the defendants will have liberty to amend and to plead anew in place of those portions of their pleadings which by the present order will be struck out. Their amended pleas however must be led within two days.

and they must be prepared to go to trial during the present term.

1883.
Nov. 20.
" 22.

Park vs. Bank of
Africa.

LAURENCE, J.:—Dealing first with the objection taken to paragraph 3 of the plea, which is in reply to paragraphs 3 and 8 of the declaration, I find that the defendants, while admitting the terms of the agreements therein set forth, say “that there were certain further conditions appended to those portions of the said agreements set forth in the said paragraphs; the conditions herein referred to formed conditions precedent to the right of the plaintiff to recover any sum or sums for extras under the said contracts, as will more fully appear on reference to the general conditions of the said contracts, copies of which are annexed hereto, and which the defendants pray may be considered as inserted herein.” The plaintiff says that this pleading is embarrassing, as it renders it necessary for him to hunt through the general conditions in order to ascertain what is referred to. I do not say that it would not have been better for the defendants to embody in this paragraph the particular conditions precedent on which they rely, but, looking at the manner in which the terms of the agreement are set forth by the plaintiff in his declaration, I do not think that the course adopted can have caused, or at all events ought to have caused, any substantial embarrassment. For on turning to the conditions we find that the plaintiff has set them forth *verbatim* down to a certain point in the middle of a sentence near the end of a clause, and there has stopped, omitting the following words “but no allowance will be made for works executed without previous order being given under the hand of the architect, and charged for within one month of such order.” It seems to be perfectly clear that these are the conditions which the defendants allege were “appended to those portions of the agreement set forth in the declaration,” and that the plaintiff ought to have experienced no difficulty in ascertaining such to be the case. Therefore I do not follow the plaintiff’s contention on this point; but on another and formal ground I concur in thinking this paragraph to be at present defective and open to exception. What is the object of making the statements

1883.
Nov. 20.
„ 22.

Park vs. Bank of
Africa.

it contains? It does not allege that the plaintiff has failed to perform, or that there has been any breach on his part of, the conditions on which the defendant relies; and the mere general denial in paragraph 8 of the allegation in paragraph 11 of the declaration “that all conditions were performed, &c.” is not sufficient to cure this defect. A mere general denial in another paragraph is not enough, in accordance with the present rules of pleading. There should be a specific statement that the conditions set forth by implication (and which I agree in thinking it would have been better and more convenient to set forth specifically in the body of the plea) have not been performed; probably the defendants will be in a position to make this statement and they will have an opportunity of doing so; but at present, and for the reason I have given, I agree in thinking that the objection to this paragraph must be sustained. As to paragraph 11, it is in substance a plea of set-off, an allegation that on a balance of accounts being taken there is a larger sum due from the plaintiff to the defendants than from the defendants to the plaintiff. But a mere bald allegation of this kind is not enough. It is the duty of the defendant to set forth truly and concisely the material facts on which he relies; and merely to aver that there are certain amounts due from the plaintiff to the defendants, without stating how they came to be due, is vague, embarrassing and insufficient. An eminent American lawyer recently remarked that, according to the present system of pleading, it is the duty of the pleader “to tell his story as any old woman would”; and pleadings certainly often err on the side of prolixity and by setting forth what is really evidence; but here the defendants have erred in the opposite direction, and the paragraph must therefore be struck out. It is said that the meaning of paragraph 11 of the plea is sufficiently explained by the claim in reconvention; but in the first place this is not sufficient; a defendant cannot be allowed to draw a vague and ambiguous plea and then say that “if you carefully examine my counter-claim, you will find out what I mean.” As FRY, L.J., remarked in the well-known case of *Crowe vs. Barnicott*, L. R. 6 Ch. D., 753:—“It is said that the whole document is a defence and

counter-claim, that it is an amalgamation of the two things, that the whole of it must be looked at together. I think that such a mode of pleading is not sanctioned by the rules, and that it would be highly inconvenient. If it were permitted the result would be that in every case of a counter-claim the pleader would omit to state the specific facts upon which he relies by way of counter-claim, and would take his chance of picking them out of the statement of defence at the trial." "It is not enough," as *Cunningham and Mattinson* concisely put it, "that the necessary facts can be found scattered throughout the defence and counter-claim" (*Precedents of Pleading*, 82). Moreover, if this objection were not in itself sufficient, the explanation given is inadmissible, for in point of fact the plea and claim in reconvention now before us are *ex facie* inconsistent, the plea alleging that a certain sum is due from the plaintiff in respect of the Kimberley contract, while the counter-claim alleges that the greater part of this sum is due on an overdraft which, for all that appears on the face of the claim, was entirely unconnected with the contract. It is true that this discrepancy has been explained in Court; but paragraph 3 of the counter-claim in its present form cannot stand, and if the defendants wish to rely on this overdraft they must, having regard to the order to plead issuably, shew by their pleading the connexion which, as their counsel has now informed us, exists. As to the rest of the claim in reconvention, I agree in thinking that the objection, that it is not in accordance with the order to "plead issuably," must fail. The meaning of that order, as I understand it, was that the defendant was not to except or plead in abatement, but that he was, according to the old phraseology, to "plead in bar"; that he was in fact to raise no technical or dilatory defences, and not to introduce any matter by way of new assignment, but to plead to the issue on which he was brought into Court; if on that issue there arises any ground of counter-claim—e.g. any claim for negligence on the part of the plaintiff in the performance of the contracts on which he sues—I quite agree in thinking that it was never intended to debar the defendant from raising it. On these grounds I concur in thinking that the

1883.
Nov. 20.
" 22.

Park v.s. Bank
Africa.

1883.
Nov. 20.
" 22.

Park vs. Bank of
Africa.

objection to paragraphs 3 and 11 of the plea and to the 3rd paragraph of the claim in reconvention must be allowed, that the respondents must pay the costs of the application, and that the defendants should have liberty to plead again forthwith, on condition of taking short notice of trial and going to trial as soon as the pleadings are closed.(a)

[Applicant's Attorney, RHODES.
Respondents' Attorneys, STOW & CALDECOTT.]

(a) [The case was heard on December 7th, 11th, 12th, 13th; but as it turned mainly on questions of fact it has not been thought necessary to report it. On December 15th the Court (BUCHANAN, J.P., and LAURENCE, J.) gave judgment for the plaintiff for £717 7s. The Court found, as a fact, that the architects had given a certificate intended to be, and which must be regarded as being, "final," on the Kimberley contract, and that in respect to this contract, and to certain "extras" and other articles for which the plaintiff was entitled to recover, there was a sum of £957 7s. due and payable to him. As to the Bloemfontein contract, no final certificate had been given and the plaintiff was therefore at present entitled to only 80 per cent. of the contract price, and he had already received this sum less £6; there was also found to be due to the plaintiff for "extras" on this contract £254, making £260 in all. This gave a total of £1217 7s. due to the plaintiff in convention, from which there had to be deducted £499 15s., which was admitted to be due to the plaintiffs in reconvention, on account of moneys drawn in advance, leaving a balance in the plaintiff's favour of £717 7s. The Court held that the remainder of the reconventional claim had failed, with the exception of a sum of about £75 for expenses which the defendants had incurred, or would have to incur, owing to bad workmanship in connexion with the Bloemfontein contract, and which sum the defendants would be entitled to deduct from the balance of 20 per cent. on the price of that contract, which would become due to the plaintiff on production of the final certificate. Taking into consideration that the plaintiff had practically failed as to the Bloemfontein contract, that he had not taken the precaution of obtaining a clear and properly drawn final certificate as to the Kimberley contract, that his affidavit of documents in his possession was incomplete and to some extent misleading, and that on his declaration as originally drawn, and without an amendment allowed during the trial by the Court, the plaintiff could not have recovered for some of the so-called "extras" claimed for on the Kimberley contract, which were really fittings and other articles supplied at the request of the defendants' manager, the Court ordered the defendants to pay three-fourths only of the plaintiff's costs.—ED.]

*4. Paper Runners v. & Kipking on 6/1. 307.
Hewson's case 1/1. 341.*

MACKIE DUNN AND COMPANY vs. TILLEY AND OTHERS.

Partnership.—Adoption by partnership of contract of previous owner of business.—Association for the purpose of forming a Company.—Holding out and giving credit.—Quasi-partners.—Liability for goods supplied to inchoate Company.

T., a manufacturer of aerated waters, &c., ordered a soda-water machine from *M. & Co.* Previous to the delivery of the machine he agreed with *F. and W.* to sell his business to a joint-stock Co. of which *F. and W.* were promoters and in which *T.* was to receive a large number of shares. *T.* then retired from the management of the business, which was carried on in his absence by *F.* *M. & Co.* were informed by both *T. and F.* of the intended formation of the Company, and supplied the machine, and other goods afterwards ordered for the business, debiting the Company, which however they knew had not then been formed, in their books. The attempt to form a Company having fallen through, *W.* took no part in the management of the business, which was carried on by *F.*, acting to some extent under instructions from *T.*, who was still absent and who had never transferred the property. The orders to *M. & Co.* were received from an agent of *F.*, and ratified by him. *T.* also corresponded with *M. & Co.*, on the subject of the business, of which he afterwards resumed possession and attempted to effect a sale, the proceeds of which were to be divided between him and *F.* *F., T. & W.* subsequently disclaimed any responsibility, either jointly or severally, for the goods supplied, and *M. & Co.* sued them as partners. Held, that there was no evidence of partnership against *W.*, who was therefore absolved from the instance; but that the facts disclosed and amounted to a partnership for the purposes of carrying on the business between *F. and T.*, who were therefore jointly liable for the goods supplied.

1883.
Nov. 21
" 23
" 26.
" 28.
Dec. 15.

This was an action in which the plaintiffs, merchants at Port Elizabeth, claimed the sum of £1133 17s. 4d. for goods

Mackie Dunn &
Co. vs. Tilley and
others.

1883.
 Nov. 21.
 " 23.
 " 26.
 " 28.
 Dec. 15.
 ———
 Mackie Dunn &
 Co. vs. Tilley and
 others.

sold and delivered, commission and charges. The original defendants were Tilley, a brewer residing at Dutoitspan, and Wilson, a licensed victualler, and Foggitt, a baker, both residing at Kimberley. While the action was pending Foggitt died, and his executors were substituted as co-defendants by leave of the Court. The declaration alleged that on or about April 14th, 1881, the plaintiffs procured for and at the request of the defendant Tilley a certain soda-water machine. Subsequently, on or about May 1st, 1881, Foggitt and Wilson "having entered into co-partnership with Tilley for "the purpose of carrying on the business of a soda-water "manufactory under the style or firm of 'The Union "Brewery and Aërated Water Company,' or of forming a "Company for such purpose, adopted and took over on "behalf of the said partnership the said agreement made by "and between the said Tilley and the plaintiffs in respect to "the said machine." [This portion of the declaration was excepted to, but the exception was overruled, the question of costs being reserved ; see Reports, vol. i. part iii. p. 423]. It was further alleged that in consequence of such adoption of the contract as aforesaid the soda-water machine was delivered to and accepted by the defendants, and other goods and merchandise, of which an account was annexed, amounting in all with commission, &c., to the sum now claimed, had subsequently been delivered to them, for the purposes of the said business at their special instance and request. The defendant Foggitt in his plea denied the alleged partnership or that the goods and merchandise in question had been taken over or ordered by him or supplied to him, or that he was liable in any way in respect thereof ; if they were ordered and supplied at all it was by and to the defendant Tilley and not by or on behalf of or with the authority of Foggitt or of the alleged partnership, which never existed. A similar plea was filed by Wilson. The defendant Tilley in his plea admitted ordering the soda-water machine, but denied that it was delivered to him or to anyone at his request ; he denied the alleged partnership and stated that at the time alleged in the declaration, i. e. May 1st, 1881, he ceased to carry on the business of a brewer and manufacturer of aërated waters, in which he had previously been engaged, and at the

request of the other two defendants entered into an agreement with them that they should attempt to form a Company to carry on the business, and for the purpose of floating the Company (in which if formed, and the business taken over, he was to have certain shares) he left the plant and stock of his business in the custody of the other defendants. No Company, however, was ever formed or registered, and consequently no shares were allotted to him, and if the other defendants or any other persons, either before attempting to float such Company or after they had failed to float it, carried on the business in the name of a Company or otherwise, it was not done at his instance or request or with his sanction. He denied the delivery to him or at his instance of the goods and merchandise for which the plaintiffs claimed, and averred that between May and September 1881 (the period over which their account extended) he had no interest or concern in or control over any business (if any there were) carried on by the other defendants, or in the name of the "Union Brewery and Aërated Water Company," or by any persons whatsoever. The plaintiffs joined issue on the several pleas.

From the evidence it appeared that the defendant Tilley had for many years carried on business as a brewer and manufacturer of aërated waters at Dutoitspan. At the beginning of the year 1881, being anxious to retire from business, he advertised the premises, plant, goodwill, &c., of the concern for sale. On his not getting a suitable offer, it was suggested to him by the defendant Foggitt that the concern should be converted into a Company. In furtherance of this idea Tilley and Foggitt called on Wilson, a licensed victualler, who had considerable influence with the other licensed victuallers in Kimberley and Dutoitspan. It was then agreed between them that Foggitt and Wilson should float the Company, for which service, if they were successful, they were to receive a substantial reward (Tilley said £500 each, but Wilson contradicted him on this point and swore he was to get only £100). Thereupon the following document was drawn out:—

"Mr. Tilley wishing to retire from business offers his Brewery and Aërated Water Manufactory with rolling stock, stock in hand, machinery

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.
—
Mackie Dunn &
Co. vs. Tilley and
others.

1883.
 Nov. 21.
 " 23.
 " 26.
 " 28.
 Dec. 15.
 ———
 Mackie Dunn &
 Co. vs. Tilley and
 others.

and goods and machinery to arrive as per memorandum hereunder, to a Company, for the sum of six thousand pounds sterling in six hundred shares of £10 each payable as follows:—£2 10s. on allotment: £2 10s. three months after: £2 10s. six months after: £2 10s. nine months after. Mr. Tilley engages to take two hundred shares and binds himself not to dispose of more than one-half thereof for a period of twelve months."

[Here followed a memorandum of the property, stock, &c., on hand and to arrive, the latter including a "No. 1 Soda-water machine," which Tilley ordered on April 14th, 1881, just about the time the prospectus was drawn up.]

The document proceeded as follows:—"The sum of £1000 is to be set aside as working capital." Then followed, "Names of parties who have agreed to take shares."

[Here followed a list of names which after a canvas Wilson and Foggitt had obtained as subscribers. The full number of shares (400) was subscribed for, Wilson and Foggitt each figuring as a subscriber for 20 shares.]

At this time the property, &c., mentioned in the prospectus was pledged to the Cape of Good Hope Bank for about £900, which Tilley owed to the Bank, and when the list of subscribers was complete the document was taken to the Bank by Tilley and Foggitt, the project was explained to the Manager, and the following additions were made to the document:—

"On payment to me of the several instalments within mentioned I undertake to transfer the property described to such directors as may be appointed as trustees to hold the same, say in all £4000 sterling.

"*p*: *pro*: C. G. H. Bank (Ltd.),

"H. J. FELTHAM,

"KIMBERLEY, *May 3rd*, 1881."

"Manager.

"I have requested the Cape of Good Hope Bank, holders of the above mentioned property, to transfer the same in manner above described.

"*3rd May*, 1881."

"E. TILLEY.

Mr. Feltham also held a general power of attorney from Tilley to enable him to act for him in this matter. The above document was left in his charge at the Bank. Tilley also swore to the contents of another document now lost, signed by himself, Foggitt and Wilson, and the purport of which, was that Foggitt and Wilson, in consideration of receiving £500 each, would float the Company, and manage the business till it was taken over by the Company. In this, however, he was distinctly contradicted by Wilson; and Mr. Feltham, with whom Tilley alleged this document also

was left, knew nothing about it. The Court came to the conclusion that there had been no such document and that Tilley had confused his memory in this respect. About May 1st, 1881, Foggitt and Wilson accompanied Tilley to the Brewery premises, where he shewed them the buildings, stock, &c. At this interview was present one Almond who, in view of Tilley's departure to Cape Town, had been engaged by Foggitt to manage the business of "the Company." At this interview Tilley maintained that he had finally handed over the whole concern to Foggitt and Wilson and that he thenceforth had no more than a shareholder's interest in it. With regard to the "management" Tilley swore that Foggitt and Wilson had undertaken the duty absolutely as managing directors of the Company, whereas Wilson swore that he never undertook such a duty, and that Foggitt merely promised Tilley to look after his interests until the Company was formed and came into possession. A few days after, on or about May 3rd, Tilley left Kimberley for Cape Town, and the Brewery, &c., was thenceforth managed by Almond, under the superintendence of Foggitt, under the style of "The Union Brewery and Aërated Water Company, Limited." Tilley wrote from Cape Town to the plaintiffs that he had sold his business to a Company, still retaining a large interest himself. Shortly after Tilley, who was an old customer of the plaintiffs, had left, their travelling clerk, Currie, arrived at Kimberley. Almond called upon him and explained that Tilley's business had been converted into the Union Brewery and Aërated Water Company, that he was now the manager, that Foggitt and Wilson were the directors, and that the Company was not completed but that they were holding for the Company. He then dictated a large order, which Currie said must be ratified by his (Almond's) principals. They thereupon went to Foggitt who went over the order and ratified it. This order comprised nearly the whole amount for which the present action was brought, with the exception of the soda-water machine, ordered by Tilley on April 14th. The business as now carried on did not pay—mainly, according to Foggitt, on account of the non-arrival of the soda-water machine, the order for which, through some error in the plaintiffs' Port

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

Elizabeth office, had not been forwarded to England until September, at which time the machine ought in the proper course to have arrived at Dutoitspan. Consequently the formation of the Company had to be abandoned and nothing further was done in that respect. Meanwhile voluminous correspondence had been taking place between Almond, on behalf of the Union Brewery and Aërated Water Company, and the plaintiffs, between the plaintiffs and Tilley, and between Tilley and Foggitt. That between Almond and the plaintiffs related mainly to orders for the business and their execution by the plaintiffs. That between the plaintiffs and Tilley at first consisted merely of requests to him on their part to use his influence with the Company to get them to make prompt settlements and to give promissory notes for moneys due; but latterly, when they began to be alarmed, they plainly told him that they looked to him for payment and alleged that they would not have given the concern credit had it not been for his connexion with it. The correspondence between Tilley and Foggitt related to the conduct of the business, and, when it became certain that a Company could not be formed, to the causes of the failure, &c. In this correspondence Tilley sometimes interfered in the management of the business, at one time sending up a manager from Cape Town, and often referred to it as "our Brewery" or in equivalent terms. Until October, 1881, Foggitt had been advancing moneys and incurring and meeting liabilities on account of the business, and a page in his ledger shewed the United Brewery and Aërated Water Company was indebted to him in the sum of about £1200. In that month, however, Currie again appeared at Kimberley and pressed him to sign promissory notes for some of the goods delivered. He then refused to sign, and Currie had to leave without getting the notes. He returned again in February, 1882, and had another interview with Foggitt, who then told him that he had nothing to do with the concern and that he must go to Tilley and Almond for a settlement. Wilson also repudiated all liability. In January, 1882, Tilley came back from Cape Town, and Foggitt then rendered him an account for the £1200 advanced to the business during his absence. Tilley did not repudiate his liability, but took over possession of the premises and the

management of the business; and on January 23rd, 1882, he conditionally sold the whole concern to Almond and one Ross-Christie. This sale was effected by a document in the following terms:—

“Purchase of Brewery and Aërated Water Works, plant and stock.

“Mr. Tilley to accept £1450 payable as follows :

“Cash	£700
“[Then Promissory notes amounting to] ..	750
	<hr/>
	£1450
	<hr/>

“Tilley to give transfer of the property on receiving cash £700.

“Agreed to by

(Signed)

“E. TILLEY,

“F. W. ALMOND,

“KIMBERLEY, 23rd January, 1882.

“H. ROSS-CHRISTIE.

“This proposal only to be valid in case Mackie Dunn and Co. accept the present purchaser's bill for the amount owing, supposed to be about £1000.

“Mark Foggitt to receive cash £367 13s. 11d.

“Promissory note at 3 months for £500.

“Promissory note at 7 months endorsed by Tilley for £500.

“(Signed)

MARK FOGGITT,

F. W. ALMOND,

“KIMBERLEY, 23rd January, 1882.

H. ROSS-CHRISTIE.

“Witness,

“(Signed) E. TILLEY.”

This sale however fell through. Tilley then resumed work on his own account at the Brewery, putting everything belonging to the “Company” aside, not using the machine and plant which had arrived during his absence, and placing outstanding moneys which he collected to a special account; the plant and moneys which he thus had in his possession amounted to about £250. It should be added that Almond was not called as a witness by any of the parties; search had been made for him, and it was stated that he had disappeared.

Hoskyns, C.P. (with him *Lange*), for the plaintiffs, argued that upon the facts a partnership had been proved to have existed between the three defendants. They had formed themselves into an association which dealt with third parties and credit had been given to the association and not to any

1883.
Nov. 21.
“ 23.
“ 26.
“ 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

1883.
 Nov. 21.
 " 23.
 " 26.
 " 28.
 Dec. 15.
 —
 Mackie Dunn &
 Co. vs. Tilley and
 others.

particular members of it. There was no dispute that these goods had been ordered on behalf of the Union Company and delivered to the carriers as agents of the consignees. There was no contradiction of Currie's evidence that he was informed by Almond that Foggitt and Wilson were his principals, and that Foggitt confirmed this and ratified Almond's order. He contended that Tilley's statement as to the preliminaries was more probable and trustworthy than that given by Wilson. The evidence clearly shewed that Wilson helped to take stock at the manufactory and then went away with the other defendants, leaving Almond who, counsel contended, was in his, as well as in Foggitt's, employ, in possession as manager. The correspondence proved that Almond had managed the business under Foggitt's orders. There was at this time an association between the defendants, and, if they were not actually partners, they were severally liable to third parties; Tilley really sold the business out and out to the association of which he was a member. The first entry to the Company's account in Foggitt's ledger was in December, 1881, though Almond had been paying in money for months before. Of course Wilson was not a party to the subsequent agreement of sale, as before it was made he had repudiated his shares in the concern. There was evidence as to Foggitt going down to the Brewery, and the correspondence between Almond and the plaintiffs, taken in connection with the other facts, clearly shewed that Almond was acting on behalf of the defendants. Tilley's evidence was most clear and specific as to the nature of the document drawn up between the parties, and it could not be doubted that all the arrangements, as to goods ordered by Tilley, &c., would not have been made without some written agreement. When Tilley said that he had sold to a Company, the plaintiffs knew that he was still connected with it, and this connexion was proved by his subsequent correspondence both with the plaintiffs and with Foggitt. The defendants had held themselves out as partners to the plaintiffs and, if not so in law, they were still liable as promoters for the preliminary expenses, including the plaintiffs' account now sued on.

Davison, for the defendant Tilley, commented on the careless manner in which the plaintiffs had done business.

What was there to shew to whom they gave credit at the time of supplying the goods? Their books and invoices shewed that they debited the "Union Company" which they knew did not exist. Whom were they justified by the facts before them in giving credit to? He referred to the evidence as to the proceedings of Foggitt and Wilson; the alleged document was last in Foggitt's possession, and Tilley's version of its contents was corroborated by the probabilities of the case. Under the other document, signed by Feltham, which had been produced, the property would not be transferred until some time after the Company was formed and till all the instalments had been paid. Tilley gave notice to the plaintiffs that he had sold, and they simply asked his opinion of the new concern. Almond's order was accepted by Currie after getting Foggitt's ratification, and it did not appear that Tilley's name was then mentioned. Almond, Foggitt's own agent, afterwards wrote to the plaintiffs that there would be some delay in accepting their drafts owing to Foggitt's absence from Kimberley. The plaintiffs had full notice that they were not supplying Tilley at this time, and his correspondence with Foggitt was merely that of an absent shareholder advising as to the conduct of a concern in which he was largely interested. Tilley was not liable unless Foggitt was managing as his agent, and the entries to the Company in his ledger shewed that this was not the case. When both Foggitt and Tilley were at Cape Town, Almond still communicated with Foggitt only. The explanation of Tilley's subsequent attempt to sell the business was that he had been worried and was willing to make any sacrifice to get rid of the affair. He contended that the plaintiffs had given credit to Foggitt and Wilson personally, and they alone were liable, if anyone was. Wilson's whole conduct was inconsistent with his having had no interest in the concern beyond that of a subscriber for a few shares; why did Almond apply to Wilson for an advance in Foggitt's absence? Tilley had had no benefit from the transaction, and the goods supplied by the plaintiffs, and now lying at the manufactory, were still at their service, as was the money collected by Tilley on account of the Company's dealings.

Forster (with him *Hopley*), for the other defendants:—

1885.
Nov. 21
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

1883.
 Nov. 21.
 " 23.
 " 26.
 " 24.
 Dec. 15.
 —
 Mackie Dunn &
 Co *vs.* Tilley and
 others.

The plaintiffs have declared upon a partnership between the three defendants, and unless they prove the existence of such partnership their action must fail as being misconceived, whatever their remedies against any of the individual defendants may be. The declaration alleges that Foggitt and Wilson entered into a copartnership with Tilley under the style or firm of the Union Brewery and Aërated Water Company, or, in the alternative that they entered into a copartnership with Tilley for the purpose of forming such Company. As to the first of these positions, there is no evidence of any partnership. What really happened was that Foggitt and Wilson agreed to get up a Company to the trustees of which, when it was formed, Tilley's property was to be transferred. The Company never was formed and Tilley's property never vested in anyone else. It certainly never belonged to the other two defendants. Tilley upon his return from Cape Town immediately resumed possession of his property and even sold it conditionally. With regard to this sale Foggitt knew what was going on, but Wilson was never even consulted in the matter. There clearly was no partnership between the defendants. As to the second position taken by the plaintiffs, it is well settled that there can be no partnership between persons who are joined together for the purpose of floating a Company; *Lindley on Partnership*, 4th ed. i. 27, 32, 242; *Dickenson vs. Valpy*, 10 B. & C. 141. In the present case "the time agreed on" for the partnership to come into existence was the time when the Union Brewery and Aërated Water Company *Limited* was properly floated and registered under the Act. Thus in no view of the position of the present parties were they partners, and the acts of each are only binding against himself. He referred to the note on *Thompson vs. Davenport*, 2 Smith's L. C. 392, 8th ed.; *Barker vs. Stead*, 3 C. B. 946; *Reynell vs. Lewis and Wyld vs. Hopkins*, both reported at 15 M. & W. 517; *Cullen vs. Wright*, 7 E. & B. 301, cited in *Dickson vs. Reuter's Telegraph Co.*, L. R. 3 C. P. D., *per* Bramwell, L. J., at p. 5. If the partnership is not proved the plaintiffs cannot bring their action against Foggitt as they have done; they might, if he held himself out without authority, sue him for breach of warranty; 2 Smith, L. C. 393; *Pothier on Obliga-*

tions, i. sect. 75. If the plaintiffs are suing Foggitt as a principal, when he was only the agent of undisclosed principals, the action in this form must fail entirely. As to Wilson, he never did any act which could make him liable in any way, and he never held himself out as a partner. There is no quasi partnership in this case; *Lindley on Partnership*, i. 33, 47. The plaintiffs in one of their letters say that they gave credit only to Tilley and not to either Foggitt or Wilson. Thus they cannot treat the latter as quasi partners. Wilson's conduct in visiting the manufactory was simply that of a man going to ascertain if it was worth while to take shares. This is all the evidence against Wilson and till the Company went through there could be no question as to his liability. He ordered none of the goods, never had any communication with the plaintiffs or Currie, never went near the Brewery, and when spoken to by Almond repudiated all liability. Even taking Tilley's evidence as perfectly correct, there was nothing to connect Wilson as a partner; at most it shewed a mere agreement with him to help to float the Company. He never held himself out as a partner or shared any profits, or received any account. As to the Company it never came into existence. Tilley continued his control over the property, of which transfer was never passed; Foggitt acted as his agent, or perhaps carried on the business on behalf of an inchoate Company, which really was Tilley. That being Foggitt's position, the plaintiffs could not recover in this form of action but should have sued him individually. Tilley could at any time have come back and reclaimed the property and entered into possession again, as in fact he did. When Foggitt sent him his account for expenses of management he did not repudiate the liability but sold the property in order to satisfy Foggitt's claim.

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others,

LAURENCE, J.:—May not the allegation as to the defendants having entered into partnership for a purpose which, as is contended, could not in law be the object of a partnership, be regarded as mere matter of recital or inducement? May it not be dismissed, if the contention is correct, as a sort of incidental "solecism," not materially affecting the substantive allegation of the adoption of Tilley's original

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

contract by the co-defendants, and the delivery to them of the other goods?

Forster:—If those words were struck out from the declaration the plaintiffs would have to shew (1) that the defendants took over Tilley's order for the machine, (2) that they ordered the other goods on their own account, and it seems doubtful whether two such causes of action could be joined. The taking over the machine ordered by Tilley would not make Foggitt his partner; *Young vs. Hunter*, 4 Taunt. 582; *Ex p. Jackson*, 1 Vesey J., 131; *Beale vs. Moulds*, 10 Q. B. 976. As to the goods supplied subsequently, it does not appear that credit was ever given to Foggitt or Wilson, whose names do not appear in the plaintiffs' books; Foggitt declined to accept the drafts when presented to him, and yet goods were subsequently supplied. There is no evidence that Wilson entered into, or ratified, or received benefit from, any contract, and therefore the proof of the existence of a partnership is essential to his liability. As to Foggitt, he did not order or use these goods on his own account and, as the Company did not go through, he must be taken to have acted for Tilley throughout; his account shews that he credited Tilley with all receipts, and the amount which he was to receive under the subsequent agreement of sale was on account of his claim for disbursements made on behalf of Tilley. There was nothing to shew by whom Almond was appointed manager. In his correspondence with the plaintiffs Tilley spoke of "my business" and never disclaimed responsibility for the concern or stated that Foggitt was responsible. It is submitted that the action is wrongly brought, and also that on the facts there is nothing to shew any liability of Foggitt or Wilson, either as principals, which they were not, or as agents for a Company which never existed. There is no evidence against Wilson, while that against Foggitt is purely inferential and the balance of inferences is in his favour.

Hoskyns, C.P., in reply, admitted that a committee of promoters were not as such and *per se* partners, but they might become so by their conduct. If the object of the promoters was not merely to form a Company, but to make

a profit out of its formation and carry on the business in the interval, they would be liable to third parties as partners; *Lindley*, i. 91-98. The business in the present case was carried on as alleged in the declaration for several months. If there was not sufficient evidence as against Wilson his name could be struck out, and the others held liable; or if either Tilley or Foggitt is considered solely responsible, as carrying on the business, the plaintiffs could recover in the present action against him, proving their case by his own acts. There was no misrepresentation by Foggitt or the other defendants, as it was known the Company was not in existence, and this was therefore not a case for an action for breach of warranty or deceit. As to Foggitt's account with the Company, it shewed profits from the first, and yet Tilley was not credited with them; it was clear from all the facts that Foggitt was not acting merely as Tilley's agent.

Cur. adv. vult.

Postea (Dec. 15), the following judgments were delivered:—

BUCHANAN, J.P.:—The plaintiffs in this action are a firm of merchants carrying on business at Port Elizabeth; the defendant Tilley formerly carried on business, as a manufacturer of aerated waters, at Dutoitspan, the defendant Wilson is a licensed victualler at Kimberley, and the other defendants have been joined as executors of the late Mark Foggitt, who was a baker at Kimberley, and who has died since the commencement of the action. The plaintiffs allege that in the month of April, 1881, they procured a certain soda-water machine from England at the request of the defendant Tilley, but before this machine arrived Tilley had entered into a partnership association with Wilson and Foggitt for the purpose of carrying on the business of a brewery and aerated water manufactory, or in order to form a Company for that purpose, and the machine was consequently supplied not to Tilley but to the said partnership, by whom Tilley's contract with the plaintiffs had been adopted and taken over. It is further alleged that other goods and merchandise were subsequently delivered to the partnership for the purposes of the said business, and the

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

1883.
 Nov. 21.
 " 23.
 " 26.
 " 28.
 Dec. 15.
 —
 Mackie Dunn &
 Co. vs. Tilley and
 others.

claim of the plaintiffs, for goods supplied, commission, charges, &c., amounts in all to £1133 17s. 4d. The defendants Foggitt and Wilson filed separate pleas but to the same effect, in which they deny the supplying of the goods and deny the existence of the partnership; they plead that if the goods were supplied at all they were supplied to Tilley and they were in no way liable in respect thereof. Tilley admits the ordering of the machine, but denies that either this machine or any of the goods were supplied to him; he denies the existence of the partnership, and alleges that, in or about the month of May, 1881, he ceased to carry on his business as a soda-water manufacturer, &c., and handed over the business premises and stock-in-trade to the defendants Foggitt and Wilson, in order that they might float a joint-stock Company to carry on the business, in which Company he was to have a certain number of shares. No Company however was formed and consequently he received no shares, and anything which the other defendants or either of them may have done, subsequently to May, 1881, in carrying on the business and ordering goods, was in no way at his instance or request; he therefore denies that he is in any way liable for any goods which the plaintiffs may have supplied to them, and alleges that at the time when these goods are said to have been supplied he had no interest or concern in or control over any business which may have been carried on in the name or on behalf of the proposed Company. The plaintiffs' replication to these pleas is general. (His Lordship then proceeded to review at some length the facts which had been stated in evidence, and the correspondence between the parties which had been put in, and continued as follows:—)

The main question which the Court has to decide in this case is purely one of evidence. We have to determine whether the facts proved disclose the existence of such a partnership between all the defendants, or any of them, to carry on the business, formerly belonging to Tilley, under the style or firm of "the Union Brewery and Aërated Water Company," as would render them jointly liable for the goods supplied and charges incurred by the plaintiff firm. It might be possible perhaps in another form of action to make the defendants, or some of them, severally and individually

liable, in consequence of their own acts and statements, for goods supplied by the plaintiffs in reliance on such conduct. But here the plaintiffs distinctly declare on a partnership, the existence of which they are bound to prove; and if they fail to do so, the necessary legal result must be an absolution from the instance for all the defendants. Now although no deed of partnership has been produced, and the evidence is of an indirect and circumstantial character, after a careful consideration of the correspondence, many portions of which are extremely significant, and of the evidence given in Court, I have come to the conclusion that the existence of a partnership for the purposes of this business between Tilley and Foggitt has been clearly proved. The points against Foggitt are very many and very clear, bristling as they may be said to do through his correspondence and his conduct. Foggitt was the prime mover in the arrangements made for floating the joint-stock Company, which project ultimately failed. Before Tilley left Kimberley for Cape Town, in May 1881, Foggitt went down to Dutoitspan to take stock of the business, and from that date forward the business was to all intents and purposes carried on by him. He virtually superintended and managed it, and I am satisfied on the evidence that Almond, who carried on the business at Dutoitspan, and who ordered most of the goods supplied by the plaintiffs, was the agent of Foggitt. The bulk of the goods supplied were ordered by Almond from Mr. Currie, the plaintiffs' agent at Kimberley, and Foggitt personally ratified the order, without which Currie tells us he would not have taken it. Almond has since disappeared, but there can be no doubt as to the inferences which must be drawn from what we have heard of his proceedings. Then it appears that Foggitt kept the accounts of the business, made considerable advances for the purpose of its being carried on, settled some of its local liabilities, drew the receipts and at first made no objection, and took no steps to repudiate his connection with the concern, when bills were drawn upon him by the plaintiffs. It is contrary to human nature and to all reason to suppose that Foggitt did all this out of mere disinterested friendship and a desire to promote the interests of the inchoate Company. As regards Tilley the proofs against

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

him are not so numerous but some are of irresistible force. Tilley, after he had left the Diamond Fields, continued in his correspondence with Foggitt to take a very different tone to that of a man who had parted with all his interest in a business, and had merely agreed to take part payment of the purchase money in the shares of the Company which was to be formed. I feel no doubt whatever that, as Tilley himself states, before he left there must have been concluded some agreement in writing between himself and Foggitt, though the document he has referred to cannot now be found, and its exact contents must remain matter of conjecture. We find Tilley writing from Cape Town to Foggitt and at one time sending a notice of dismissal to Almond, who was then receiving the goods, and acting as manager of the Brewery; Tilley writes to Foggitt that Almond has deceived "us," that he is sending up a man named Smith to manage "our brewery," and that he is certain that Smith will give "us" satisfaction. He alleges that he did all this in the interest of the Company, and it is probable that Tilley, who is obviously not a man of business, may have never accurately defined his own position to himself; but whatever he may himself have thought, I can come to no other conclusion than that he held himself out as a partner, and must therefore be held liable as such. There was a great deal of correspondence going on at the same time between Tilley and the plaintiffs; and to my mind it is perfectly clear that the plaintiffs were to a great extent influenced in continuing to supply goods to large amounts to the "Union Brewery" by the fact that Tilley informed them that he retained a large interest in the concern. Of Foggitt and Almond they knew little or nothing; but Tilley had long been a customer of theirs, with whom their dealings had been satisfactory; and although they might well have been expected to display a greater amount of caution, before they supplied these goods on credit, in ascertaining whom they were dealing with, I think they were to a great extent justified by Tilley's correspondence in concluding that in him they still had a largely interested and responsible party, to whom they might fairly look to see that the liabilities of the business were settled in due course. For myself, I am free to say that I feel a good deal of sympathy for Mr. Tilley, who has certainly been a heavy loser; he has lost a

valuable business, and got only trouble and embarrassment instead of the profits which he anticipated; but Tilley, like many others at that time, erred in taking too roseate a view of the possibilities of the future, and thought that the formation of a joint-stock company was a short and easy road to wealth. He omitted to take proper business precautions, and for that unfortunately he has to suffer. Tilley, in fact, has been like Alnaschar in the Arabian Nights, trading in imagination on his little stock not of glassware but of scrip, doubling and trebling it in his dreams, till at last on awakening he turns it over with his foot, and demolishes all his imaginary wealth. I think this is a case in which we are justified in coming to the conclusion on the facts that a partnership has been proved to have subsisted between Foggitt and Tilley, and therefore Tilley and Foggitt's executors must be held liable as partners for the goods supplied by the plaintiffs. With regard to Wilson, I confess that I have felt a good deal of doubt. There is a good deal in the evidence to point to the supposition that he also was a partner, although a sleeping one, and I am by no means satisfied that he was merely, as he himself states, interested as a promoter in the formation of the proposed Company, which fell through. His case is however very different from Foggitt's, as there is nothing to shew that after Tilley's departure he took any active part in the management of the concern. It is true that he had gone down to inspect the premises and stock, but this is not in itself sufficient to make him liable as a partner; it is also proved that at one time, in Foggitt's absence, Almond applied to him for an advance, but he then declined to give such assistance. My learned colleague entertains a strong opinion that partnership on the part of Wilson has not been made out, and on the whole I am not inclined to differ from that view. If Wilson had a greater interest in the concern than now appears, at all events he has been sufficiently astute to prevent the production of any satisfactory evidence of the fact. In my opinion the evidence is not sufficient to justify a judgment against him, nor yet does it justify a clear judgment in his favour. I think the plaintiffs should be allowed an opportunity of bringing forward any further evidence which they may be able to procure of Wilson's liability, and he will therefore at present be absolved from

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

—
Mackie Dunn &
Co. vs. Tilley and
others.

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

the instance. Judgment will be entered against Tilley and Foggitt's executors, jointly, for the amount claimed, with costs, the amount of the account annexed to the plaintiffs' declaration not being in dispute. Wilson must have his costs, and the other defendants must be ordered to pay the plaintiffs' costs in those previous applications in the case of which the costs were ordered to be reserved.

LAURENCE, J.:—Although the facts which it has been necessary to consider in this case are both numerous and somewhat complicated, and their true legal aspect and effect has required much and careful consideration, I think it sufficient, without going much into detail or reviewing the evidence, oral and documentary, at any length, to briefly express the conclusions at which I have arrived. The plaintiffs sue the defendants as co-partners on two accounts—one for a soda-water machine, commission, and charges, amounting to £94 19s. 7*d.*, and the other for goods supplied, commission, and charges, amounting in all to £1038 17s. 9*d.* As to the machine, it was ordered by the defendant Tilley and supplied to the Dutoitspan business with his knowledge and consent, and it is now in his possession; no counter-claim has been set up for damage sustained by the delay which took place in its delivery; and there seems to be no doubt that Tilley could be held liable for the amount of account A, as, indeed, he appears to admit. As to account B, it consists (with the exception of a few pounds) of goods ordered from Currie, the plaintiffs' traveller, by one Almond, who, I think, it is clearly proved was the agent of the late Mr. Foggitt; Foggitt ratified the order on behalf of the Union Brewery Company, Limited, a Company which, as Currie knew, was then merely inchoate, and which in fact never came into existence; the goods were supplied to the business, which Foggitt was managing at the time; Foggitt is proved (by the evidence of Hull and Roper) to have incurred and settled other liabilities on account of the business; he was held out by his agent Almond as the person who would settle the plaintiffs' claims; and in point of fact, when their account was presented, he does not seem to have in any way repudiated his liability, but merely to have set up certain *contra* claims, one of which arose out of his own dealings as a baker with the

plaintiffs as importers of flour. In these circumstances, I think that, while Tilley could have been made liable to the plaintiffs on account A, Foggitt's executors could equally have been made liable on account B, but I do not think they are grounds on which to maintain the present action, in which the plaintiffs seek to recover solely on the ground of a partnership subsisting against the defendants, and of the goods in question having been supplied for the purposes of the partnership. It appears to me that the action must fail unless the plaintiffs can prove a partnership against the three defendants, or between any two of them. I may add that if the action did so fail, through non-production of such proof, the plaintiffs in my opinion would have only themselves to blame, considering the loose and unbusiness-like manner in which they acted, supplying goods to a large amount to an inchoate Company, and without any clear understanding at the time as to who was to be liable, or any guarantee of a settlement of their account. A judgment of absolution is an inconclusive and almost invariably unsatisfactory decision, but I am bound to say that at one time I entertained grave doubts as to whether we could come to any other decision on the facts of the present case. With regard to the defendant Wilson, I may say at once that I am clearly of opinion that the plaintiffs have failed to prove their case. No act or word of his has been proved inconsistent with the theory that he was merely associated with the other defendants in an abortive attempt to promote the establishment of a joint-stock Company—an association which of course would not in itself amount to what the law regards as a partnership. For myself, I feel little doubt that this was his position. At the interview in the upper room at the "Blue Posts," whether there was any written agreement, which Tilley alleges and Wilson denies, makes no real difference. According to Tilley, the effect of the agreement was that Wilson should receive fully paid up shares to the value of £500 for his trouble as a promoter, and in consideration of the connection he was able to secure among the licensed victuallers. According to Wilson himself, it was verbally arranged that he should receive £100 in shares in return for such services, and also in consideration of his placing his name at the head of the list of proposed shareholders. It seems to have been

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

a natural result of this arrangement that he should have canvassed for shares and paid the visit which has been described to the property under offer to the proposed Company. There are some minor points of conflict, as to dates and so on, between Tilley and Wilson, to which it is unnecessary to refer. It seems clear that after the visit to Dutoitspan Wilson declined to take any further trouble in the matter. He never communicated with the plaintiffs about the Company or held himself out as interested in the business; and when Almond applied to him for assistance to meet the current liabilities, he refused to give it. As far as Wilson is concerned, if I had been sitting alone, I should have given him judgment; but as the Judge President thinks it safer to leave the case open, in case any additional facts which would have the effect of attaching a liability to him should transpire, I feel no difficulty in his case in concurring in a judgment of absolution from the instance, with costs. With regard to the other defendants, they certainly did not hold themselves out to the plaintiffs as partners, and the only real question—a very difficult question, as I have found it, to decide—is whether in point of fact their conduct was such as to attach to them the legal relation and liabilities of partners. The plaintiffs allege that the defendants entered into a partnership “for the purpose of carrying on the business of a soda-water manufactory under the style or firm of the Union Brewery and Aerated Water Company, or of forming a Company for such purpose.” The former of the two alternatives suggested would form a legitimate subject of partnership, while an association of promoters to form a Company would not in itself entail any such relation. It seems to me, however, that a partnership might well be formed to carry on such a business with not so much an alternative as an ultimate intention of converting the partnership into a joint-stock Company, and that this is the real gist of the plaintiffs’ allegation. Whether the partnership were or were not the ultimate object of the combination, the parties who had entered into a trade association involving gain and loss—an association of the nature defined by Van der Linden, Bk. IV., Sect. 11, pp. 570–571—must be subject to all the liabilities of partners, so long as that association

continues to exist under the original conditions (whether those conditions were intended to be temporary or permanent) and is not merged or converted into something else. On the whole I think that from the time that Tilley left the Dutoitspan business to the superintendence of Foggitt and his manager, Almond, until, early in the following year, he again took it over himself, there was a legal partnership existing between the two defendants. It seems to me that, while Tilley contributed the stock, Foggitt contributed his superintendence, and that he continued to do so for some considerable time after the prospect of forming the Company had become extremely remote. The parties, as Pothier puts it, in the passage quoted by Van der Linden, were under the mutual obligation of fairly accounting to each other. The essential requisites of the contract of partnership (which of course like any other contract may be either express or implied) are laid down by Van der Linden as follows:—

“1. That each brings something into the society, or binds himself so to do, whether it be money or any other article, or whether it be diligence or labour.

“2. That the partnership be entered into for the mutual benefit of *both* parties; since if it were for the benefit of one only it would then be a mere contract of *mandate*.

“3. That the object of the parties in entering into the contract be to gain a profit, in which each may expect to participate in proportion to the share he has contributed to the common stock” (p. 571).

I think that all these essential requisites are to be found in the present case. It can scarcely be supposed that a busy man like Foggitt would take over an extensive business of this kind, order goods for it, and make payments on its account, without anticipating some benefit in return, whether the Company were formed or not; and Tilley must surely have understood that this would be Foggitt's position. There is no proof of any contract of mandate or any arrangement by which Foggitt was to receive a salary for his services; and I think, therefore, that had the business prospered he would have been entitled to demand a share of the profits. Tilley, on the other hand, though he informed the plaintiffs he had sold his business to

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

1883.
Nov. 21.
" 23.
" 26.
" 28.
Dec. 15.

Mackie Dunn &
Co. vs. Tilley and
others.

the Company, knew as a matter of fact that the Company had not gone through; he assumed the right to discharge one manager and substitute another, which he could not have done if he had been a mere shareholder in the Company, however largely interested, and from his correspondence with Foggitt, in which it should be observed he uses the phrase "our business," and other very significant phrases which have already been cited by the Judge President, it is clear that he assumed that he and Foggitt were the only persons who had anything to say to the management of the concern. Lastly, we find that Tilley subsequently entered into a contract to sell the business; the written agreement is produced, and it appears that the purchase money was to be divided between him and Foggitt. On the whole, therefore, I think that the goods supplied by the plaintiffs during the period in question, must be regarded as having been supplied to Tilley and Foggitt trading together in copartnership as the Union Company, and that as such they are therefore liable for the amount claimed. I cannot help expressing my regret in the case of Mr. Tilley that his attempt to convert what appears to have been a thriving private business into a joint-stock Company should have ended, like many other similar attempts, in nothing but disaster and heavy pecuniary loss. It would, however, have been almost equally regrettable if the plaintiffs, careless though they appear to have been, had through such carelessness lost their right to recover the value of goods which they undoubtedly supplied in good faith, largely relying I doubt not on the connection between the proposed Company and their old customer Tilley—goods, too, of which a certain proportion are still in Mr. Tilley's possession. I have, not without difficulty, come to the conclusion that the plaintiffs, as against Tilley and the executors of Foggitt, have established their right to the relief they claim. This judgment of course will in no way prejudice any claim which the respective defendants may have against one another with relation to the premises.

[Plaintiffs' Attorneys, GRAHAM & HAARFORD BROS.;
Attorney for Foggitt's Executors, CORVINO;
Attorney for Tilley, RABBITT; Attorneys for
Wilson, Snow & CARPENTIER.]

GOLDSCHMIDT AND COMPANY vs. PAGE.

*Ordinance 6 of 1843, sections 41, 42, 52.—Removal of trustee.
—Misconduct.*

Where certain creditors of an insolvent estate sought to set aside the election of the trustee on various grounds, of which the only one seriously pressed was an allegation of misconduct, and the alleged misconduct was that the trustee's report failed to sufficiently disclose the nature of certain transactions between the insolvent and various creditors, which required investigation, and also that the trustee had been guilty of neglect in not applying for a commission to examine certain witnesses as directed at a meeting of creditors; the Court, finding no proof of mala fides in the conduct of the trustee in the matters complained of, refused to set aside his election.

This was an application for the removal of the respondent from the office of trustee of the insolvent estate of J. W. Matthews, and for an order for the election of a fresh trustee, on the grounds (1) that the respondent, as a member of the firm of Ross, Priest and Page, had an interest opposed to the general interest of the creditors (2) that the respondent's partners, Messrs. Priest and Ross, on the petition of the former of whom the estate had been sequestrated, had had certain transactions with the insolvent, which required careful investigation (3) that the respondent had neglected his duty in not investigating certain transactions by the insolvent with other creditors whose claims had been used in support of his election (4) that he had failed to give effect to a resolution of creditors passed at the third meeting, held on September 5th, 1883, directing him to apply to the High Court for a commission to examine certain persons touching the estate and dealings of the insolvent (5) that the sequestration of the estate had been obtained on a petition presented by the respondent's partner, on an understanding with the insolvent, and with a view to defeat the judgment debt and attachment obtained by certain creditors (6) that there was

1883.
Nov. 22.
" 30.
—
Goldschmidt &
Co. vs. Page.

1883.
Nov. 22.
" 30.
Goldschmidt &
Co. vs. Page.

an agreement or understanding between the respondent and certain creditors that, if they voted for his election as trustee, he would abstain, as he had in fact abstained, from opening up or investigating certain transactions between them and the insolvent of questionable validity (7) that he had been privy to an arrangement by which certain claims on the estate had been divided in order to increase the number of votes and so influence the election of the trustee (8) that the respondent, in return for the vote of his partner Priest, had undertaken to share with him his remuneration as trustee. The notice of motion was dated September 26th, but two or three postponements had been applied for in order to complete the affidavits on both sides. The application was supported by the affidavit of Mr. H. S. Caldecott, of the firm of Stow and Caldecott, attorneys for the applicants, who stated that he attended the third meeting of creditors on September 5th, and proved the applicants' claim, which was for an unsecured debt of about £1075. At this meeting the trustee filed his report and the deponent thereafter examined the insolvent, and copies of the report and examination were annexed to his affidavit. From the examination it appeared that shortly before sequestration the insolvent had effected a nominal sale of horses, carriages, jewellery and other personal effects to one G. J. Lee, who had proved for a large amount on the estate, and subsequently the deponent had unsuccessfully endeavoured to induce the trustee to take steps to investigate this transaction in the interest of the creditors. Mr. C. Sonnenberg, a member of the applicants' firm, made an affidavit in which he stated that the grounds for the removal of the trustee as set forth in the notice of motion were true and correct to the best of his knowledge and belief; he added that it appeared from the examination of the insolvent that there were numerous transactions requiring careful investigation, which the respondent had neglected and failed to make. On behalf of the respondent an affidavit was filed by his attorney, Mr. Coryndon, who stated that the delay in applying for the issue of a commission had been owing to the refusal of the applicants, at whose request it had been decided that a commission should be obtained, to give an adequate

guarantee for the expenses involved, as they had undertaken to do at the meeting of creditors; he stated that the whole estate would probably be absorbed by a preferent creditor who objected to the expense of a commission. He had not yet had time to master the various facts in connection with the insolvent's transactions, which were numerous and complicated, but would be prepared to advise the trustee to apply for the proposed commission on a satisfactory guarantee for the expenses being given by the applicants, as promised at the third meeting. There was also an affidavit by the respondent himself, in which he stated that he was unanimously elected trustee at the second meeting of creditors, his nomination being seconded by the present applicants. At the third meeting no objection had been raised to his report, and he had on the first opportunity after the meeting consulted his attorney with reference to obtaining a proper guarantee for the expenses of the proposed commission, which would otherwise probably necessitate a contribution from the concurrent creditors, who could have no practical interest in the result; several creditors had given him notice that they objected to any such expenditure being incurred and threatened to hold him personally liable for the same, and he had therefore been advised by his attorney to act with great caution in the matter. He added that he was making careful inquiry into the various transactions referred to in the applicants' affidavit, and the nature of the debts and claims which had been proved. He totally denied that he had any interest opposed to the general body of creditors, and annexed a statement from all the creditors who had proved, with the exception of the applicants and one other, to the effect that they were satisfied with his administration of the estate and objected to the proposed commission on account of the expense, unless a satisfactory guarantee were given by the party who desired it. He further stated that he had not yet had time to investigate fully the various matters in question; and entirely denied the imputations on his impartiality, and other allegations in the notice of motion, which he described as false and malicious. He had neither canvassed for votes, nor been privy to any arrangement for division of debts for the purpose of securing votes.

1883.
Nov. 22.
" 30.

Goldschmidt &
Co. vs. Page.

1883.
Nov. 22.
" 30.

Goldschmidt &
Co. vs. Page.

nor agreed to share his commission in return for any vote ; there had been no contest for the position of trustee, and he was not aware of his intended nomination till after the election had taken place. Neither he nor his firm had ever had any transactions with the insolvent, and he should naturally treat any private transactions the insolvent might have had with either of his partners in their individual capacity as if they were transactions with third parties. The respondent's denial of the charge that he had agreed with certain creditors, in return for their votes, not to open up certain transactions between them and the insolvent, was corroborated by a joint affidavit filed by the creditors in question, Messrs. Lee and Hofmeyr. An extremely long replying affidavit was subsequently filed by Mr. Sonnenberg (on account of whose absence in the Transvaal the matter had been postponed) in which he stated *inter alia* that a guarantee of the expenses of the proposed commission had been given verbally on behalf of his firm at the third meeting of creditors, and was duly entered on the minutes, annexed to the affidavit of Mr. Caldecott. He alleged that the creditors who had supported the trustee in his subsequent demand for a further guarantee were all persons whose claims on the estate were of questionable validity, and whose relations and transactions with the insolvent would require careful scrutiny and investigation. He added that, owing to the neglect of the trustee, the opportunity for the examination on commission of the preferent creditor, Mr. Crawford (who claimed under a bond and promissory note ceded to him shortly before the insolvency, without recurrence, by Mr. W. Ross, one of the trustee's partners), had been lost, Mr. Crawford in the interval having left the Colony. It was true that the deponent's firm had seconded the nomination of the respondent as trustee at the second meeting, but their objections had arisen subsequently owing to certain facts and circumstances disclosed at and after the third meeting, and owing to the unsatisfactory nature of the trustee's report. He considered that the report, when compared with the disclosures made on the examination of the insolvent, proved that the trustee had made no proper inquiry into and report upon the affairs of the estate for the

information and guidance of the creditors. He referred in detail to various transactions of which particulars were elicited from the insolvent in examination, alleged to be of a suspicious nature, and submitted that the omission of these matters from the report indicated a grave dereliction of duty on the part of the trustee, whereby the interests of the creditors had been jeopardised. The trustee's statement that he was carefully examining all debts which had been proved was a further admission of neglect on his part, as he had been confirmed in his appointment on the 17th of July last, and was only now examining the debts after notice of application for his removal had been given; as to the transactions with Lee and Hofmeyr, which were alleged to amount to undue preference, the insolvent had himself given ample information at his examination to enable the trustee to act, if he had chosen to do so. He denied that the allegations on which the application had been founded were false and malicious, and repeated that the dealings of the respondent's partners with the insolvent, and the fact (which had not been denied) that one of them had obtained the sequestration on an understanding with the insolvent, in order to avoid a surrender by means of schedules, and to defeat the attachment obtained by the applicants' firm, rendered the respondent an improper person to discharge the functions of trustee. He alleged that if the respondent did not personally canvass for votes his partners did and several of the proofs of debt were in the handwriting of Mr. Priest, to whose proceedings the respondent must be regarded as privy; the commission earned by the respondent as trustee would in the ordinary course be shared with his partners, Messrs. Ross and Priest, both of whom had proved on the estate. Another creditor, Mr. Wernher, stated that Mr. Coryndon, the trustee's attorney (who had previously acted as attorney for the insolvent) had waited on him with a document (the statement annexed to the trustee's affidavit), objecting to the expense of the proposed commission, and requested him to sign the same, which he had refused to do.

Forster, in support of the application, referred to Ordinance 6, 1843, sections 41, 42, 52. The trustee in an insolvent

1883.
Nov. 22.
„ 30.
Goldschmidt &
Co. vs. Page.

1883.
Nov. 22.
" 30.
—
Goldschmidt &
Co. vs. Page.

estate possessed large powers and a wide discretion, and should be beyond any tinge of suspicion. The trustee's report in the present case was entirely silent with reference to the extraordinary transactions mentioned by the insolvent in his examination. The motion was based on eight grounds, of which he mainly relied on the third and fourth—the neglect of the trustee to investigate certain transactions, and his failure to apply for a commission as directed at the third meeting, which he contended amounted to misconduct, and furnished grounds for his removal under section 52. As to the objection to the applicants' guarantee, it had been given and accepted at the third meeting, as appeared from the minutes, and the trustee had been directed to apply for the issue of the commission, and it was his duty to comply with this decision instead of waiting for advice from Coryndon, who was attorney for the trustee, for his partner, the petitioning creditor, and also for the insolvent. It seemed that Coryndon, instead of calling another meeting of creditors, drew up a protest against the commission and took it round to creditors for their signature; all who had signed it were tainted creditors, whose transactions with the insolvent required investigation. As to the report, it never mentioned Crawford's preferent bond, and, after the insolvent's examination on this point, it was clearly the duty of the trustee to investigate the circumstances in which this bond had been ceded to Crawford. The consequence of his neglect in not obtaining the commission was that the opportunity of testing Crawford's proof had been lost; he contended that the trustee's inaction in this matter amounted to misconduct. The only remedy now would be an expensive commission to England, the cost of which would be a heavy burden to the estate. The trustee, whose appointment was confirmed in July, ought certainly to have completed his examination of proofs before October. The claims of Lee and Hofmeyr were as dubious as that of Crawford, and grievous delay had occurred in their investigation; the trustee had not taken the trouble to obtain the insolvent's books and ascertain the position of his affairs. He referred to the examination of the insolvent as to the circumstances of the sale of his effects to Lee, and of his business to Hofmeyr, and other matters

which he contended should have been dealt with in the trustee's report. Then as to Coryndon's statement that he had not yet had time to master details and ascertain whether it was advisable for the commission to be applied for, that was not his business, but that of the trustee. As to the other grounds for the trustee's removal, he contended that his partners and all the other creditors, with the exception of the applicant and Wernher, ought to have their transactions with the insolvent fully investigated, and the trustee's interests were thus really in conflict with the "general body" of *bonâ fide* creditors. The allegations as to the circumstances of the sequestration had not been denied, and in those circumstances he contended that the respondent should be removed, in order that some impartial person might be appointed trustee. There was no direct evidence of the sixth and seventh grounds of objection, but the trustee was a partner of creditors, and would therefore necessarily divide his commission with them; he referred to *Preuss and Seligmann vs. Bosman*, Buch. 1868, 113. It was not necessary to prove that consideration was actually given for votes, if the motive of the parties could be clearly inferred from their general conduct. It was not denied that the other partners, who had voted, would share in the trustee's commission. The main point was whether, looking at the report, the examination of the insolvent, and all the attendant circumstances, it was not sufficiently clear that the trustee was not a proper person to administer this estate, and should therefore be removed.

Hoskyns, C.P. (with him *Davison*) for the respondent, referred to the judgment of the Chief Justice in *Turner and Company vs. Schaefer*, 2 Juta, 101. When it was sought to remove a trustee under the provisions of section 41 of Ordinance 6 of 1843, the applicant "must be prepared with the clearest proof that this ground of disqualification really exists." Here there were a number of serious imputations made, but little if any evidence to support them beyond Mr. Sonnenberg's statement that he "verily believed" them to be correct. The refusal of the trustee to go to the expense of a commission which would probably involve a heavy contribution account, without some adequate guarantee, was not *prima facie* misconduct; and there was no impropriety in Coryndon,

1883.
Nov. 22.
" 30.

Goldschmidt &
Co. vs. Page.

1883.
Nov. 22.
" 30.
Goldschmidt &
Co. vs. Page.

who was himself a creditor in the estate, getting a document signed protesting against that course. As to Crawford's going away without being examined, there was nothing to shew that the trustee was aware of his intention to leave. The trustee would have been negligent if he had applied for a commission in the face of the protest he had received, and with merely the personal and verbal guarantee of one concurrent creditor. Instead of attempting to remove the trustee for "misconduct," the applicants' proper remedy would have been to apply for a *mandamus* to compel him to obtain the commission. There must be *crassa negligentia* to constitute misconduct, and the case must be clearly proved. There was no proof of any collusion or agreement between the trustee and creditors not to investigate the matters referred to, which probably required investigation. All that a trustee was expected to do in the first instance was to open the eyes of the creditors and put them on inquiry; and this was sufficiently done in the present instance by the trustee's report, presented at the third meeting, where the insolvent was present, and an inquiry was immediately instituted. It might be said that the respondent was young and inexperienced, and his report was not that of an experienced trustee, but it indicated nothing in the way of misconduct. As to Crawford's bond, the only question was, not whether it should be investigated, but who was to pay for the investigation. All the creditors except the applicant and Werner, who was indifferent, objected to the issue of a commission without a better guarantee, and the respondent really had not had sufficient time in the circumstances to decide what course it was best to adopt. The Court would regard the manner in which this application had been brought forward, and the *animus* which had been displayed. The other objections were unsupported by evidence, and had been put on record simply to prejudice the mind of the Court with regard to the whole case.

Forster, in reply, referred to *Ex p. Bates*, 21 L. J. Eq., Cases in Bankruptcy, 23, *per* KNIGHT BRUCE, L.J. Whatever view the Court might take on the other grounds, he submitted, with regard to the third and fourth grounds of objection, that there was proof both of actual misconduct,

and of such gross negligence as to amount to constructive misconduct. There was no excuse for the trustee not acting on the guarantee given by the applicants at the third meeting, and no allegation on affidavit that the guarantee was not sufficient.

1883.
Nov. 22.
" 30.
—
Goldschmidt &
Co. vs. Page.

BUCHANAN, J.P.:—This is an application of an unusual kind, and the remedy sought for by the applicants is one which has only been granted in exceptional circumstances. There appear to be very few cases in the books in which creditors in an insolvent estate, after electing a trustee to represent their interests, have afterwards come to the Court to apply for his removal, under the provisions in that behalf contained in the Insolvent Ordinance. There is the case of *Preuss and Seligmann vs. Bosman*, referred to by Mr. Forster, in which the trustee was removed and declared incapable of re-election; but there it was clearly proved and indeed admitted that the trustee had promised a creditor valuable consideration in order to obtain his vote, and the Court had therefore no alternative but to hold him disqualified under the terms of section 42. I am not aware of any other reported case in which a trustee has been removed on similar grounds to those on which the present application is based. It must be borne in mind that such an order as is now applied for involves a very serious stigma on the respondent, and if the application were to succeed on the ground of misconduct it would be the natural sequence for the Court to declare the respondent disqualified for life from holding the position of a trustee in insolvency. Before an order of this kind is made, the Court must be clearly satisfied of its necessity. Now it seems to me that, putting aside the allegations of misconduct, all the other grounds on which it has been attempted to support this application are entirely untenable. There is practically no evidence in support of them, and I think it is to be regretted that an applicant should, so to speak, scatter aspersions broadcast, as has been done in the present case, without being in a position to support such charges by clear and convincing evidence. Then the question remains whether the trustee has been shewn to have so misconducted himself in his office as to

1883,
Nov. 22.
" 30.
Goldschmidt &
Co. vs. Page.

necessitate his removal. This allegation is mainly based on the fact that while, at the third meeting of creditors, the trustee was instructed to apply for a commission for the examination of certain witnesses as to their transactions with the insolvent, no such application has hitherto been made. As to this, in the first place it may be remarked that the delay complained of was after all not very great, notice of the present motion having been given within three weeks of the meeting of creditors at which this resolution was passed, and only two months after the election of the trustee. This is certainly an extremely short time, especially when we bear in mind that under the Ordinance a trustee has six weeks allowed him within which to determine whether he will take up an action previously brought by the insolvent. It is clear that in the interval after the meeting was held certain difficulties occurred, with regard to the nature and sufficiency of the guarantee for the expenses of the commission, and I am not satisfied, on a review of the evidence, that the delay on the trustee's part was so unreasonable as to amount to misconduct and so disqualify him from his office. On the contrary I think the balance of evidence is in favour of his conduct in the matter having been perfectly *bonâ fide*; he was acting under legal advice, and it may be that he leant too much on his legal adviser, but if the delay has resulted in evidence being lost, or rendered more difficult to obtain, that may have been not owing to any fault on the part of the trustee, but owing to the difficult circumstances in which he found himself placed. Moreover it appears to me that this was a case in which another remedy existed, of which the applicants might well have been expected to avail themselves. They might have applied for a *mandamus*, or an order of a similar nature, on the respondent to come to the Court for the commission, and then the various parties could have been heard, and the question of whether a further guarantee was advisable, in the interest of the general body of creditors, could have been considered. A special meeting of creditors might also have been held to urge the trustee to take promptly the proceedings which had been suggested. Now, when another course is open to the parties by which their object might be obtained, I think that in itself is a very

good ground for the Court to decline to take the extreme step which is now applied for. All these considerations would have made me feel reluctant to grant this order ; but I must say that any doubt I might otherwise have felt has been dispelled by the reference to the recent case of *Turner and Company vs. Schaefer*, where a principle in dealing with matters of this kind was laid down by the Chief Justice which I think this Court should not hesitate to follow. In that case the Chief Justice said :—"Where a person has once been appointed trustee, it must necessarily cast a slur upon his reputation if that appointment is set aside. Therefore the Court requires a much stronger case than the present to justify it in cancelling an appointment already made. If the applicant, on bringing stronger facts before the Court, should wish to renew the application, he will not be debarred from doing so, but the present application must be refused with costs " (2 *Juta*, 103). I think that those observations equally apply to the present case, and that the result in the present case must therefore be the same.

1883.
Nov. 22.
" 30.
Goldschmidt &
Co. vs. Page.

LAURENCE, J. :—I entertain considerable doubt as to whether Mr. Page is a suitable or competent person to administer this important estate ; his own counsel states that any errors he may have committed are the result of his youth and inexperience, and I doubt very much whether this is an estate which should have been placed in the hands of a young and inexperienced trustee, however anxious he may be, as stated in his affidavit, to gain a reputation by his success in dealing with such matters. But we have to deal with the matter on the footing that the estate has been placed in Mr. Page's hands by the unanimous resolution of the creditors, including the present applicants ; his election has been duly confirmed by the Court in the ordinary course ; and it is therefore now necessary for the applicant to shew very solid and substantial reasons before his removal can be ordered by the Court. The application is based on sections 41, 42 and 52 of the Insolvent Ordinance of 1843. It does not appear to me that the trustee has been shewn to have any interest opposed to the general interest of the creditors, or to have been guilty of any of the acts set forth in section 42 as grounds on which the Court can

1883.
Nov. 22.
" 30.

Goldschmidt &
Co. vs. Page.

declare a trustee to have forfeited his office ; in fact, there was no reason why he should enter into any dubious or improper arrangement with any creditor, in order to secure his vote, at an election which was in fact unanimous, and where no contest seems to have been anticipated. It only remains to consider whether the trustee has been guilty of misconduct, within the meaning of that word as employed in section 52. No doubt crass negligence, or *lata culpa*, might be held to amount to misconduct ; but I do not think that any such gross negligence has been proved in the present case. The trustee's report was certainly not as full and explicit, with regard to certain transactions which took place shortly before the insolvency, as it ought to have been ; but, as far as it went, his statement of the position of the insolvent's affairs seems to have been correct enough ; and the creditors were not prejudiced or misled by the meagreness of the information he supplied as to the manner in which and conditions under which the movables had been disposed of, and the bond passed, and the other matters referred to, as the insolvent was immediately subjected to a searching examination by the present applicants' attorney, by means of which full particulars were elicited. The only other charge of misconduct arises from the delay of the trustee in applying for a commission for the examination of certain witnesses, as proposed by the applicant at the above meeting ; a delay which it is said has proved gravely prejudicial to the creditors. But when we bear in mind that the meeting was held only on September 5th, and that notice of this application was given on September 26th, just three weeks afterwards, I cannot think that the trustee's delay in the matter was so unreasonable as to amount to misconduct. I think that, considering the strong opposition to the proposed commission expressed by the majority of the creditors, the trustee might well be justified in taking a reasonable time to consider whether he could safely incur the responsibility of applying for an expensive commission, especially in an estate where there appears to be little prospect of any substantial dividend for the concurrent creditors, of whom the applicant is one. I therefore concur in thinking that no sufficient ground for the removal of the trustee has been made out to the satisfac-

tion of the Court. I may add that, whether the commission is eventually obtained or not, there certainly appear to be matters connected with this insolvency which will require careful investigation; and it is to be hoped that, after what has taken place, and the serious allegations which have been made, the trustee will, so to speak, be placed on his mettle, and furnish by his future conduct in the trust the best justification for the present decision of the Court.

Application refused with costs.

[Applicants' Attorneys, SNOW & CALDECOTT.
Respondent's Attorney, CORRYDON.]

1883.
Nov. 22.
„ 30.
—
Goldschmidt &
Co. vs. Page.

PULLINGER vs. HARSANT.

*Malicious arrest.—Trespass.—8th Rule of Court.—
Damages.—Costs.*

II. having brought two actions against P., the latter proceeded to leave the Colony, after being examined on commission, shortly before the trial. H., having failed to obtain security, caused P. to be arrested, but the writ was subsequently set aside. P. brought an action for malicious arrest and trespass. Held, on the facts, that there was no evidence of malice, but that, the writ having been set aside, the arrest amounted to a trespass, for which the plaintiff was entitled to recover; but that the circumstances were such as to justify the Court in awarding only nominal damages, without costs.

This was an action for £5000 damages for malicious arrest and trespass. The plaintiff, a widow residing at Du Toits Pan, alleged in her declaration that, at the time of the grievances complained of, she possessed considerable property in the district of Kimberley. In the month of April, 1882, the defendant, an accountant at Kimberley, had brought two actions against her, one being against her in her individual capacity for £2866 for commission and advances.

1883.
Dec. 3.
„ 5
—
Pullinger vs.
Harsant.

1883.
Dec. 3.
" 5.
Pullinger vs.
Harsant.

and the other against her as executrix of her late husband for £1350 as commission and advances. After the plaintiff had appeared and pleaded in these actions and given her evidence on a commission appointed by this Court for her examination *de bene esse*, and after the said causes had been set down for trial, the plaintiff falsely, maliciously and without reasonable cause made two affidavits, of which copies were annexed, and on them procured a writ and caused the plaintiff to be arrested and imprisoned at Cape Town for a long time, to wit from March 27th to March 29th, 1883, after which, on application by the plaintiff to two of the judges of the Supreme Court, the writ was discharged and the plaintiff released. There was an alternative count in trespass to the effect that the defendant, without any regular or valid writ, warrant or authority, had caused the plaintiff to be assaulted and imprisoned in the gaol of Cape Town for the space of two days. It was alleged that by reason of the said assault, imprisonment and trespass the plaintiff had been prevented from proceeding to England for seven days, and had been put to great expense and been prevented from attending to her business, and suffered other loss and damage. The defendant, in his plea, denied that the plaintiff possessed considerable property at the time of the alleged grievances, as stated in the declaration; he denied that he had made the affidavits in question falsely and maliciously, or without reasonable and probable cause, or that he had wrongfully and unlawfully and without reasonable and probable cause obtained the arrest of the plaintiff, or that he had not procured a regular or valid writ, warrant, or authority for the plaintiff's arrest. He denied that the plaintiff had suffered damage or if she had that he was answerable therefor. The statements in the affidavits were true and correct and made without malice, and with reasonable and probable cause. After the writ was discharged the plaintiff proceeded to England, and remained absent from the Colony until after the hearing of the actions mentioned in the declaration, on May 8th, 1883, in one of which the present defendant recovered £1450 and in the other £700, in both cases with costs. These judgments had not been satisfied and subsequently, on September 10th, 1883, the estate of the plaintiff

had been compulsorily sequestered by order of this Court. The defendant further pleaded that, after satisfying himself that sufficient grounds were disclosed in the aforesaid affidavits, the Registrar of the Supreme Court issued the writ against the plaintiff, as he lawfully might, being in no way induced thereto by any fraud or falsehood on the part of the defendant, by reason whereof the defendant was discharged from all liability in respect of the same. The replication was general.

The plaintiff stated that, at the time of leaving Kimberley, on March 21st, 1883, she owned sufficient property, in houses and claims, to meet the amount of the defendant's demand, but admitted in cross-examination (the details of which will more fully appear from the judgments below) that her affairs were in an entangled state, and her property had afterwards proved insufficient to meet her liabilities. A demand for security was made before she left, but nothing was arranged. The defendant's attorneys refused the security of her property and demanded personal security, which she failed to obtain ; after this she admitted that she was aware that there was some chance of her being arrested. She had urgent business to attend to in England, and was arrested on board the outgoing steamer in Table Bay. She was imprisoned for two days and then released. She had to get her passage transferred and waited five days for the next steamer ; her hotel bill amounted to £5. The writ having been discharged with costs, her legal expenses were paid by the defendant. She had suffered in her feelings and been damaged in her credit in England in consequence of the arrest. In cross-examination she stated that at this time her home was in England, where her children were living at her residence in Essex. She left Kimberley by private cart one evening, but before sundown, in order to catch the post-cart at Hope Town ; having been detained by the commission she was unable to leave by the regular coach. A certified copy of the proceedings in the Supreme Court was put in, including an affidavit by the plaintiff in which she stated that she was only going to England for a short time on urgent business and that all her property was situated at Kimberley, and was amply sufficient to meet the defendant's claims, in which statement she

1883.
Dec. 3.
" 5.
Pullinger vs.
Harsant.

1883.
Dec. 3.
„ 5.
Pullinger vs
Harsant.

was corroborated by an affidavit sworn by one Biden. This closed the plaintiff's case. The defendant called no evidence, but put in four letters from his attorneys to the plaintiff's attorney, dated respectively March 14th, 16th, 19th, and 21st, applying for security and ultimately stating that, this request not having been complied with, there was no alternative but to apply for a writ for the plaintiff's arrest. A writ had accordingly been obtained from the Registrar of the High Court, but before it could be executed the plaintiff had left the Territory.

Forster, for the defendant, submitted that the plaintiff could not succeed unless she shewed that the defendant's conduct was false and malicious; he referred to *Addison on Torts*, 4th ed. 625, as to what constituted a malicious arrest under the English process. The English Statute, 32 and 33 Vict. c. 42, s. 6, was almost identical with our rule of Court. If an order for a *capias* was obtained and afterwards discharged, no action would lie if the original order were fairly obtained, without fraud or falsehood. In the present case the statements in the defendant's affidavits were undoubtedly true; he referred to *Hoffman vs. Meyer*, Buch. 1876, 42.

Hoskyns, C.P., contra, contended that the defendant's proceedings had been wholly unjustifiable. No authority was quoted to shew that this was a case in which there could be a lawful arrest of the person. The arrest *iudicium sisti* was only in the cases of *peregrinus*, *pauper* and *suspectus de fuga*; *Voet*, ii. iv. 19, 21. There was no reason to suspect the *bona fides* of the plaintiff as to her object in leaving for England; she might have a domicile here as well as there.

LAURENCE, J., referred to *Roberts vs. Tucker*, 3 Menz. 132.

Hoskyns, C.P.:—That was an arrest under the 8th Rule of Court. Clearly this was not so, or the Judges of the Supreme Court would not have discharged the writ on the ground that the then defendant was not *suspecta de fuga*, as it appears they did; for *suspicio de fuga* is unnecessary to an arrest under that Rule, and the Judges must therefore have held this to be an arrest at common law, which is only

justifiable in the above-mentioned cases. As to the imprisonment, it is submitted there was no valid writ, and therefore there was a trespass, for which the plaintiff can recover. As to the writ against the defendant in her capacity as executrix, she was not liable to personal attachment beyond the amount of the property she held, and all the property was situated here; he referred to *Codrington vs. Lloyd*, 8 A. & E. 449; *Bates vs. Pilling*, 6 B. & C. 38.

Forster, in reply, admitted that trespass would lie if the writ was bad, but here the writ was good enough, and was merely set aside on the ground that it was supported by insufficient evidence. He contended that the Registrar of the Court was to some extent a judicial officer, and exercised his judicial functions on the affidavits submitted to him. He distinguished the present case from *Codrington vs. Lloyd*, where the *capias* was set aside for irregularity. Here there was no allegation that the writ was obtained either by *suppressio veri* or *suggestio falsi*. The statements in the affidavit were made *bonâ fide*, the Registrar in the exercise of his discretion issued the writ, and the defendant was thereby protected.

Cur. adv. vult.

Postea (Dec. 5),—

BUCHANAN, J.P., said:—This is an action in which the plaintiff claims the sum of £5000 damages for malicious arrest and false imprisonment. It appears that, the present plaintiff having left for England while an action was pending in which she was defendant and the now defendant plaintiff, the defendant, having failed to obtain any security for her return to abide the judgment of the Court, caused her to be arrested at Cape Town on board the steamship *Moor*, just as she was leaving the Colony. She remained two days in gaol, and it does not appear that she offered any security, or bail-bond for her appearance on the return day of the writ, but at the end of these two days the writ was set aside by a Judge of the Supreme Court, and a rule *nisi* was granted restraining the plaintiff from leaving the Colony without

1883.
Dec. 3.
" 5.
Pullinger vs.
Harsant.

1883.
Dec. 3.
" 5.

Pullinger vs.
Harsant.

giving security. This rule was subsequently discharged by two Judges of the Supreme Court and the plaintiff proceeded to England by the next steamer. We have not before us the notes of the learned Judges of the Supreme Court, or anything to shew the reasons which guided their decision on these points, but, as will be seen from my general view of the case, the precise nature of those reasons is immaterial to our decision. Further, in the view I am rather reluctantly compelled to take of the legal aspects of this case, it is unnecessary to determine the question of malice on the part of the defendant, as to which it is sufficient to observe that the evidence seems to be very weak and unsatisfactory. Neither is it necessary to determine whether the plaintiff was at the time to be considered as *incola* or *peregrina* or whether her position was such that she was liable to be arrested at all. The real question is whether, in point of fact, she was lawfully arrested. If the defendant caused the plaintiff to be arrested without any proper process authorising that course, the arrest must necessarily be regarded as a trespass, for which the plaintiff must have her action. Now, the writ, having been set aside by a Judge of the Supreme Court, must be taken to have been irregularly issued, and the defendant's proceedings were therefore without legal protection. This is clearly shewn by the *dicta* of all the Judges of the Court of Exchequer in the case of *Collett vs. Foster*, which was not quoted during the argument, but to which my attention has been subsequently directed by my brother LAURENCE, and to which he will fully refer, leaving it unnecessary for me to say more than that it fully bears out the legal position which I have stated. The plaintiff is therefore entitled to damages, but in assessing those damages the Court is entitled to consider all the circumstances of the case, and particularly the sudden and, I might almost say, surreptitious manner in which the plaintiff left Kimberley. When security was demanded of her she did not dispute her legal obligation to give it, and when she left without giving it she admits that she knew she ran the risk of being arrested. The defendant being technically in the wrong, the plaintiff must have judgment, but the case is certainly not one for heavy damages, and I

think that by awarding the sum of £10 as damages we shall be satisfying the requirements of the case. As to costs we have felt considerable difficulty. The matter is one on which we have to exercise our discretion, and we cannot think that, having due regard to the conduct of both parties, the case is one in which the defendant should be saddled with all the costs. I think it will be equitable to leave each party to pay their own costs; the only alternative would be, regarding the case as one of false imprisonment, to award the plaintiff Magistrate's Court costs only, a course to which my brother LAURENCE was at first inclined; but the case is one involving legal points of importance, and, if the action was to be brought at all, it was one for a superior Court to decide. On the whole therefore the Court will give judgment for the plaintiff for the sum of £10, but will make no order as to costs.

1883.
Dec. 3.
" 5.
Pullinger vs.
Harsant.

LAURENCE, J.:—The plaintiff in this action sues the defendant for £5000 damages for malicious arrest and in the alternative for assault and trespass. In order to recover on the first ground she must prove that the arrest was malicious and without reasonable and probable cause. It seems that the defendant had brought two actions against the plaintiff—in which he claimed a large sum of money, amounting in all to £4200, and costs—and after the cases had been set down for trial the plaintiff proceeded to England, and as she failed before leaving the jurisdiction to give security, as required by the defendant, he caused her to be arrested at Cape Town on board the outgoing steamer. She was detained in gaol for two days, after which the writ was discharged by Mr. Justice SMITH, and she then had to wait some days further for another steamer. The plaintiff alleges in her declaration that at this time she possessed considerable property at Kimberley. As a matter of fact, it appears from her evidence that she then possessed one house at Bultfontein which was subsequently sold for £700; another house at Bultfontein which appears to have been pledged to the Board of Executors, who subsequently took it over; some immovable property at Kimberley, of very small value; some blue

1883.
Dec. 3.
" 5.
Pullinger vs.
Harsant.

ground, which was specially hypothecated; certain virgin claims at Bultfontein, for which it was subsequently found impossible to obtain a bid; and a large number of shares in a company in liquidation, which cannot be regarded as an available asset. On the other hand, she had made several promissory notes, amounting in all to, I think, £5000, one of which for £1000 was overdue and unprovided for. Altogether the plaintiff was obliged to admit that, whatever her hopes for the future, her affairs at this time were in a somewhat entangled state. On her intention to leave for England becoming known, the defendant pressed her by letter from his attorneys to her legal adviser to give some security. She seems to have attempted to obtain the desired security, and to induce some of her friends to enter into surety bonds, but failed to do so. She then left Kimberley in what might fairly be regarded as a somewhat clandestine manner. I do not think that in these circumstances the arrest can be described as malicious, or without reasonable and probable cause. It is said the defendant was aware the plaintiff only contemplated a temporary visit to England, with the object of arranging her affairs, after which she intended to return. But he might well have thought that, if she failed in this object, if the entanglement of her local affairs did not diminish, and if in the meantime, as indeed happened, he recovered judgments for large amounts against her, her immediate return might be somewhat problematical. As a matter of fact her estate proved insufficient to satisfy his judgments, and has been sequestered on his petition. These being the facts, I think the proof of malice has failed and the action on that ground cannot be maintained. Then comes the alternative count, so to speak, in trespass. The writ was set aside, on the plaintiff's application, by a Judge of the Supreme Court; on what precise grounds we do not know. It may be, and from the brief newspaper report of the *Attorney-General's* argument one would be inclined to conjecture, that it was held that this was not a writ of the ordinary kind, contemplated by the 8th Rule of Court, to ensure the defendant's appearance to abide the action. Here there was an action already commenced in the

ordinary way by summons; appearance had been entered and issue joined; and Mr. Justice SMITH may have held that in such circumstances there could be no arrest unless, in the words of *Voet*, there arose some *nova suspicio fugae*. The uncontradicted affidavits of the plaintiff and Biden as to the large property possessed by the plaintiff—affidavits which seem to me to have been somewhat misleading—probably had their effect; and on the return of the rule for an interdict restraining the plaintiff from leaving the Colony without giving security the Judges seem to have been strongly of opinion that if Harsant desired security he should have taken steps to obtain it before Mrs. Pullinger left the Territory of Griqualand West; evidently not being aware that such steps had actually been taken and had only been frustrated by Mrs. Pullinger's abrupt departure. However that may be, I do not think it necessary for the purposes of this case to express any opinion as to whether the writ was rightly set aside or not. The presumption is either that the order was right, or that the Judge who made it was misled by inaccurate information as to the position and proceedings of the parties. The question is, the writ being set aside, does not the arrest at once become a trespass? Mr. *Forster* has cited a passage from *Addison on Torts* as to the effect of a Judge's order, protecting a plaintiff who obtains, under English Law, a writ *ne exeat regno*; but here I feel bound to come to the conclusion that the Registrar of the Court from whom the writ is obtained is no more a judicial officer than the officer of the Court from whom a writ of *ca. sa.* is sued out, on production of the necessary affidavit, according to English practice. Now if the writ sued out by the defendant had been perfectly regular it would not have been set aside; we must take it that it was set aside for some irregularity. Then, the writ having gone, where was the warrant for the arrest? As Lord DENMAN said, in *Codrington vs. Lloyd*:—"The plaintiff here was arrested on a writ which was afterwards declared by the Court to be irregular. It was therefore as if there had been none;" and PATTESON, J., said "Mr. *James's* argument would go the length of shewing that this action did not lie against

1883.
Dec. 3.
" 5.
Pullinger vs.
Harsant.

1883.
Dec. 3.
" 5.
Pullinger vs.
Harsant.

"the principal, but it lies against him because the process, "when set aside, is as if it had never existed" (8 A. & E. 452, 453). And this be it observed is so, so far as this action is concerned, whether the writ was set aside rightly or wrongly. A case which appears to me to be very much in point, and to which, as it was not quoted at the bar, I would refer somewhat more fully is that of *Collett vs. Foster*, 2 H. & N. 356. This was an action in trespass for false imprisonment; the defendant justified under a writ of *ca. sa.*, in an action in which the then defendant was plaintiff. The replication was that the *ca. sa.* was irregularly obtained, and had been set aside for irregularity by order of a Judge. It was held that the replication was proved and that the defendant was liable in trespass for the act of her attorney in improperly causing the plaintiff to be arrested. MARTIN, B., said:—"I believe it has long been settled that when a defendant has been arrested under a writ of *ca. sa.*, which is afterwards set aside, the sheriff can justify under the writ, but the plaintiff in the suit is responsible in trespass. A client is responsible for a writ issued on his behalf by his attorney. To make a distinction between writs set aside on the ground of irregularity, and on the ground of their not being warranted by the statute referred to, would introduce difficulties. If the writ issued in course of law, and was set aside, I should be prepared to hold the client liable. Here the writ was set aside by order of my brother COLERIDGE; *whether he was wrong or right is a matter with which the Judge at nisi prius* (that is, the Judge before whom the action for false imprisonment is brought) *has no concern*. All that he has to do is to see that the Judge had authority to act. *Once set aside, the operation of the writ for the protection of the party is at an end.*" And BRAMWELL, B., said "Upon the question as to the replication, I am inclined to think the material point is, *whether the writ was set aside or not.*" And WATSON, B., said "I have always understood that where a party employs an attorney, and judgment is obtained and execution issued, and that execution set aside on the ground of irregularity, then the client is liable for any act of trespass under that process. The writ is a justification to the officer but not to the party."

In this case the point was a good deal argued whether the client was liable as well as the attorney, and not, as was unsuccessfully contended, the attorney alone. To that point it is here unnecessary to refer further. The passages from the judgments which I have quoted seem to be entirely in point, and I cannot see how any distinction can be drawn between arrest of the person under a *ca. sa.* and arrest of the person under a writ *iudicium sistendi causa*. In either case there is an imprisonment, which as soon as the writ is set aside becomes a trespass, for which the party arrested is entitled to damages. I have arrived at this conclusion with considerable reluctance, not only because of the special circumstances of the case, but also because it makes everyone who takes out a writ under the 8th Rule, which is subsequently set aside, as frequently happens, for some technical omission or irregularity, liable in damages. The law however seems clear. As to the damages however I think we are entitled to take all the circumstances into consideration, and bearing in mind the proceedings of the parties previous to the arrest, the apparent *bonâ fides* of the defendant, the reasonable cause which he seems to have had, the unsatisfactory manner in which the case appears to have been presented to the Supreme Court, and the vagueness of the evidence as to any material damage beyond the personal inconvenience, I think the case is one in which the nominal damages of £10 will be sufficient, and in which the Court, in the exercise of its discretion, may properly decline to make any orders as to costs.

1883.
Dec. 3.
" 5.
Pullinger vs.
Harsant.

[Plaintiff's Attorneys, STOW & CALDECOTT,]
[Defendant's Attorneys, HAARHOFF BROS.,]

TRUSTEES OF GATES *vs.* LE ROUX.*Provisional Sentence.—Endorsement.*

Provisional sentence refused on a promissory note on an uncontradicted allegation by the defendant that on the dishonour of the note he had passed and subsequently paid a renewal thereof with the knowledge and consent of the then holder of the original note, whose trustees now sued, and who had been connected in business with the payee of the later note.

If a note payable to order is endorsed by the payee in blank, it is not necessary, in a summons against the maker for provisional sentence, to set out in full all subsequent similar endorsements.

1883.
Nov. 27.
—
Trustees of Gates
vs. Le Roux.

Provisional sentence was prayed upon a promissory note for £108 made by the defendant in favour of Storbeck Brothers or order and by them endorsed in blank, of which note the plaintiffs were now the legal holders. The note was dated April 10th, 1881, and was payable June 10th, 1881. It was endorsed Storbeck Brothers: S. Isaacs and Company: A. Gates.

Hopley, for the defendant, took a preliminary objection that only the first endorsement was set forth in the summons, and submitted that the history of the note should be given, shewing the names of all the endorsers, in order to prevent any difficulty as to identification or other embarrassment in subsequent proceedings; he referred to *Lamb Brothers vs. Rousseau*, Buch. 1868, 3.

The Court overruled the objection, as in the present case the first endorsement, that of Storbeck Brothers, was in blank, and the note was thus rendered generally negotiable.

The affidavit of the defendant was then read, alleging that

he signed the note to accommodate the payees, expecting them to retire it on June 10th, 1881, but that on June 18th, 1881, he found it had become the property of one Hartog—who was connected in the business of bill discounting with Gates—and Hartog then agreed to take another note as a renewal for three months, provided interest and discount were added; that thereupon he did give Hartog a note for £127 in his favour; that Hartog did not then give up the note for £108 but said it was in the hands of Gates and that he would get it. That after the due date of the note for £127 the defendant was sued and judgment was recovered against him by a nominal plaintiff on behalf of Hartog and that he thereafter satisfied the judgment; that the note bears the endorsement of Isaacs and Company, of which firm Gates was a partner when both the notes were passed, matured and were satisfied; that after passing the note for £127 he made repeated applications to Hartog for the note of £108 and that he always promised to hand it over; that Storbeck Brothers surrendered their estate on June 30th, 1881, and that shortly after that date the defendant accompanied Hartog to the office of Gates and asked him to give up the £108 note, whereupon he (Gates) replied “I cannot give it you but I will file it in the estate of Storbeck Brothers,” which the defendant understood to mean that he would prove it on their estate for his (the defendant’s) benefit; that at that interview he informed Gates that he had passed the £127 note as a renewal of the previous one; that Gates, Hartog and all the partners of Isaacs and Company were at present away from the Colony. There was also an affidavit by one Lyons, setting forth that he had had large business transactions with Gates, who he knew was connected in business with Hartog, and that Hartog was always looked upon as interested with Gates in discounting and as the agent of Gates and of his firm Isaacs and Company for transactions at Du Toits Pan (the place at which the notes in question were dated). In reply to these affidavits Mr. Richards, one of the trustees, stated that Gates in handing over the securities had told him that the note now sued on was a liability of the defendant, and that he found, on

1883.
Nov. 27.

Trustees of Gates
vs. Le Roux.

1883.
Nov. 27.
—
Trustees of Gates
vs. Le Roux.

referring to the proofs on Storbeck Brothers' estate, that the present note was proved on it by Gates on his own behalf and that Gates then made affidavit that the present defendant was also liable upon it.

Hopley, for the defendant:—This note shortly after the due date was in the hands of Hartog who was connected in discounting with Gates. Gates's trustees have no greater right than he had. The antiquity of the note is also a suspicious circumstance¹ and unless the positive statements of the defendant and Lyons are disbelieved the plaintiffs cannot recover.

Hoskyns, C.P., for the plaintiffs, contended that the probabilities of the case were in their favour. If the second note was a renewal of the first, interest was charged at the rate of cent. per cent. The defendant's statements were made in the absence of Gates, and it did not appear that he had taken any steps when the note was filed in the estate of Storbeck Brothers. The defendant knew it was a negotiable instrument and left it in the hands of third parties at his own risk.

BUCHANAN, J.P. :—I think that the probabilities of success in the principal case, unless fresh facts are then forthcoming, are clearly with the defendant. At present there is nothing to contradict his statements which amount to a good defence in law. Provisional sentence must therefore be refused with costs.

LAURENCE, J., concurred.

[Plaintiffs' Attorneys, GRAHAM & GILBERT.]
[Defendant's Attorney, COGHLAN.]

Went
 4th ~~1883~~ in *Ballentine & Watson*, 20/6/05.

DREYFUS AND COMPANY vs. RINTEL.

Provisional sentence.—Deed of assignment.—Covenant not to sue.—Omission to disclose liabilities.

Where a debtor assigned his estate to his principal creditors, who, in consideration inter alia of a full disclosure in a schedule annexed to the deed of all the debtor's liabilities, agreed to work out the estate and covenanted not to sue the debtor for the amount due to them, and the debtor omitted to include certain liabilities in the schedule :—Held, that the assignees were entitled to provisional sentence on certain promissory notes made in their favour by the assignor previous to the execution of the deed, and that they were not debarred from this remedy by the circumstance that they had subsequently endeavoured to compromise with the creditors whose claims had not been disclosed.

This was an application for provisional sentence on five promissory notes, amounting in all to £6125, made by the defendant in favour of the plaintiff firm. The defendant made an affidavit stating that, subsequent to the making of the notes in question, he had, on March 12th, 1883, assigned his estate to the plaintiffs who, in consideration of a full and fair assignment, had agreed to forego their legal remedies on the notes and to work out the estate. He added that all the declarations made by him in the deed of assignment (a copy of which was annexed) were true and correct, that he had in every respect carried out the terms of the deed, and that the largest portion of his estate had been worked out and realised by the plaintiffs. In reply to this it was stated that it was one of the conditions of the deed that if the assignor kept back any part of his "estate or business" to the value of £200, the release granted to him should be void and of no effect; it was also one of the considerations of the release that the assignor should set forth in the schedule the names of all the parties to whom he was indebted and the amount of the several debts, with the exception of a few small amounts not exceeding £100 in all, which the assignees undertook to settle provided they did not exceed that sum. It was alleged that besides small debts to the amount of £109, which the

1883.
 Nov. 27.
 " 30.
 —
 Dreyfus & Co.
 vs. Rintel.

1883.
Nov. 27.
„ 30.

Dreyfus & Co.
vs. Rintel.

assignees had settled, there were other debts, amounting in all to nearly £400, which the defendant had failed to include in his schedule of liabilities.

Numerous and lengthy affidavits were filed on both sides. It appeared from the deed of assignment, containing the conditions above set forth, that the defendant had fully assigned his estate; that certain immovable property of his had not been transferred to the assignees owing, as it appeared, to their own *laches*; that three items had been omitted by the defendant from his schedule of liabilities, being two taxed bills of costs owing to Rhodes and Dewhurst, respectively, amounting to £220, and salary due to Sim, a clerk in the defendant's employ at the time of the assignment, amounting to £180; that the defendant had also scheduled Messrs. Haarhoff Brothers, and the members of that firm, as indebted to his estate, without mentioning that they had a *contra* claim for legal expenses. The plaintiffs alleged that, at the time of the execution of the deed, they were wholly unaware of these liabilities of the defendant's. The defendant asserted that he had not included the attorneys' bills in his schedule, because they were not ordinary trade debts, but that the plaintiffs knew of their existence; that they tried subsequently to compromise with Dewhurst and actually paid the amount due to Rhodes; while as to Sim the plaintiffs were perfectly aware of his claim, as their local agent, before the assignment was executed, had himself dismissed him, without paying the amount he claimed for salary; subsequent to that date the plaintiffs had been negotiating with Sim in respect to his claim. In the end the plaintiffs having failed to come to any settlement with Dewhurst and Sim, and the attempt to compromise their claims having fallen through, Dewhurst and Sim obtained judgment against the defendant for the amounts due to them, and attached the immovable property which still remained registered in the defendant's name.

Hoskyns, C.P., for the defendant, opposed provisional sentence, and contended that there was nothing to shew the plaintiffs were justified in enforcing the proviso for cancellation in the deed of assignment. The object of the schedule

was merely to shew what creditors the assignees were bound to satisfy. The only proviso for cancellation was in the event of the defendant concealing portion of the estate, *i. e.* the assets, which it was not suggested that he had done. Rintel might pay the subsequent claims out of his own funds, and the assignees would not be prejudiced. It was entirely in consequence of the *laches* of the plaintiffs that the immovable property was not transferred to them, and so protected from attachment. The property had been left in Rintel's name for months after the plaintiffs' agent had been aware of the claims of Dewhurst and Sim, and the neglect to obtain transfer was at the peril of the plaintiffs. It was clear from the terms of the deed that it was regarded as an assignment of a merchant's business; the attorneys' bills had not been sent in and were therefore not legal claims on the estate at the time of the assignment. Sim and Dewhurst had obtained an order declaring the immovable property executable on July 13th; the plaintiffs continued to work out the estate, and nothing further was heard of the matter till this summons was issued on November 14th; as to any negotiations in the interval, they were not with the defendant and he was in no way concerned in them. If there was nothing in the agreement itself making a full statement of the names of all creditors a condition precedent to its validity, the conversations at the time must be received to explain the contract and the real intention of the parties. The balance of evidence was in favour of the assignees having known at the time of the claims of Dewhurst and Sim, and they were certainly aware of those of Graham and Haarhoff Brothers and Rhodes. It must have been known by Levey, the plaintiffs' agent, that salary was due to Sim, and this also was regarded as not being an ordinary commercial debt. The case was one in which equity would lean to holding that there was a waiver of forfeiture and the penalty could not be enforced. The affidavits disclosed a *prima facie* defence, but if provisional sentence were granted the defendant would never be able to go into the principal case as he would be unable in the circumstances to find £6000 or give security. The affidavits shewed that Rintel's conduct with regard to these claims had throughout been *bonâ fide*, and it appeared that the

1883.
Nov. 27.
" 30.
Dreyfus & Co.
vs. Rintel.

1883.
Nov. 27.
" 30.
Dreyfus & Co.
vs. Rintel.

plaintiffs' attorney had really entered into a binding agreement for the settlement of Dewhurst's claim. He contended that a much stronger case than the present was required to upset an assignment, and referred to *Deare and Dietz vs. Korsten*, Buch. 1868, 17. It was clear from the judgment of HODGES, C.J., in that case that he would have refused provisional sentence in circumstances like the present. The present deed moreover contained no similar provisions to those in that case as to the effect of the non-disclosure of debts due to outside creditors. If the plaintiffs had any rights under the deed, they were estopped from obtaining the remedy now sought by their own acts and the delay which had taken place.

Forster, for the plaintiffs, contended that the probabilities of success in the principal case were in their favour; the case was really governed by the recent decision in *Harvey vs. Crawford*, *supra*, p. 31. The deed of assignment must speak for itself and could not be varied by alleged simultaneous verbal agreements; *Simpson, N.O.*, vs. *Frank and Nicholls*, 2 Buch. E. D. C. 195. The deed contained recitals "Whereas the said Rintel has no other creditors besides the above-mentioned save and except a few small accounts not exceeding the sum of £100 and the said Rintel further declares that there are no further debts due and owing by him over and above the amounts set forth and enumerated in the schedule annexed;" the covenant not to sue was "in consideration of the premises," and as the premises included a full disclosure of all debts, the consideration for the covenant had failed. The plaintiffs had not condoned this failure by their subsequent conduct, but had simply done their best to effect some arrangement with the creditors. It was in reliance on the defendant's full disclosure of all liabilities that the plaintiffs had not obtained transfer of the immovable property; if this was *laches* on their part they might have to suffer for it, but it did not bar their right to sue. Whatever passed between the assignees and the creditors, after the former became aware of Rintel's breach of the conditions of the assignment, did not prejudice their rights as against Rintel.

Postea (Nov. 30),—

1883.
Nov. 27.
" 30.

Dreyfus & Co.
vs. Rhétel.

BUCHANAN, J.P., said:—This is an application for provisional sentence on certain promissory notes made by the defendant in favour of the plaintiff firm. The defence set up is that subsequent to the making of the notes the plaintiffs, in consideration of an assignment by the defendant of his estate to themselves on behalf of the creditors, agreed to work out the estate and covenanted not to sue on the notes in their possession. The plaintiffs admit the assignment and the covenant not to sue, but allege that the latter was conditional on the defendant performing all the conditions of the deed, which he has failed to do. The real question is, has there been any such breach as alleged by the plaintiffs on the part of the defendant? Now the deed contained a provision *inter alia* that the defendant should prepare a schedule of all his liabilities—with the exception of certain small debts, not exceeding £100 in all, which the plaintiffs agreed to settle—at the time of the assignment; but in point of fact it appears that he did not schedule certain liabilities, namely debts owing by him to Messrs. Dewhurst and Rhodes for attorney's costs and to Mr. Sim for salary due, amounting altogether to between £300 and £400. This was in addition to the small debts, for the non-scheduling of which provision was made and which have been subsequently settled by the plaintiffs. This being so, the defendant clearly has not fully carried out his undertaking, as set forth in the deed of assignment, which is quite free from ambiguity on the point, and which must therefore speak for itself. I have given my best attention to the various arguments which have been brought forward on behalf of the defendant, and to the allegations contained in the lengthy affidavits which have been filed, but I must say that I can find nothing to distinguish this case in principle from that of *Harvey vs. Crawford*, which was decided in this Court a few weeks ago. A deed of assignment is always regarded by Courts of law as a contract *strictissimi iuris*; it is made, when a debtor is unable to meet his liabilities in full, for the benefit of all parties interested in the estate; and it is essential that such agreement should contain a full and complete disclosure of

1883.
Nov. 27.
" 30.
—
Dreyfus & Co.
vs. Kintel.

the exact position of the debtor's affairs. Such deeds in practice are seldom breached, which is the probable explanation of the fact that cases on the subject, and actions founded on such breach, are comparatively rare. There is however a close resemblance between deeds of assignment and composition deeds, as to which it is a well-understood principle that unless all the debts are included, and all the creditors consent, they are in no way binding on the creditors who are parties to them. The defence now set up is substantially that, even if the terms of the deed were not originally strictly carried out, there has been a waiver on the part of the plaintiffs of the breach on which they now rely. The affidavits however do not satisfy me that such is the case. No doubt certain negotiations have been carried on with the creditors whose claims were omitted; but the fact that an abortive attempt has been made to effect compromises with these creditors does not and cannot prejudice the rights of the plaintiffs as against the present defendant. When a waiver is set up, the proof of it must be clear; mere "lying-by," such as is here alleged, is not in itself sufficient to amount to a discharge; there must be some positive act of renunciation. As *Woodfall* puts it:—"Mere lying by and witnessing the breach is no waiver; some positive act must be done" (Landlord and Tenant, 12th ed. 298). There is also the further question as to how far a written deed like the present, made in favour of the creditors in general, is capable of being varied by parol evidence as to what took place, either at the time or subsequently, between the assignor and the agent of the assignees on behalf of the creditors. Whatever doubt there may be on that question, it is perfectly clear that the proof of such agreement between the parties themselves must be clear and explicit, which, considering the conflicting nature of the affidavits, certainly cannot be said to be so in the present case. On the whole therefore the conclusion at which I feel bound to arrive is that the defendant, having failed to discharge, fully and completely, the obligation cast upon him by the deed of assignment, cannot now set up that deed in bar of the plaintiffs' claim. Provisional sentence must therefore be granted, with costs. Messrs. Dreyfus and Company are a firm of standing and repu-

tation; and although it has been said that the real object of these proceedings is to force the defendant into insolvency, I cannot doubt that they will meet him in a considerate and reasonable manner, and not take any oppressive advantage of what is asserted to have been a mere inadvertent omission on his part. However that may be, if they seek their legal rights the Court must give them what they are *stricti iuris* entitled to; and for the reasons I have stated they must have the judgment of the Court on their present claim.

LAURENCE, J.:—This case has been argued at very great length, and the affidavits on which the arguments were based are exceedingly voluminous. It will be a question for the master to decide, on taxation, whether all these affidavits were really necessary, or whether they might not have been greatly condensed. I must say that I feel very strongly that the multiplication of lengthy affidavits is proving a great and increasing obstacle to the expeditious transaction of the business of this Court. It is perhaps unadvisable to point out particular instances of this tendency; but when, for instance, we find one attorney thinking it worth while to set forth for the information of the Court the whole of his conversation, word for word, so far as he can recollect it, in the form of a dialogue, with his professional opponent, the time seems really to have arrived for a word of protest. It appears to me that this matter can be decided on very simple grounds, and that a great deal of the evidence filed is entirely superfluous and irrelevant, and would probably be regarded as inadmissible in the principal case. The plaintiffs claim provisional sentence on certain promissory notes, and the defence set up is a covenant not to sue contained in a deed of assignment executed by the defendant to the plaintiffs and subsequent in date to the latest of the promissory notes. The release relied upon by the defendant was “in consideration of the premises” contained in the recitals, and was followed by a proviso that if the assignor kept back any part of his estate or business to the value of £200 sterling, with the exception of certain assets specially enumerated, the release should be void and of no effect. It does not appear to me from the affidavits that the defendant has committed any

1883.
Nov. 27.
“ 30.
Dreyfus & Co.
vs. Rintel.

1883.
Nov. 27.
„ 30.

Dreyfus & Co.
vs. Rintel.

breach of this proviso, according to its true intent and meaning ; but I do not see how it can be seriously contended that a release made in consideration of the premises still remains binding on the assignee if the consideration is not duly performed by the assignor, and this whether the particular proviso inserted for the sake of greater caution has been observed or not. No doubt a mere technical error or inaccuracy in the recitals would not necessarily absolve the assignee from his obligation under the covenant ; but here we have an essential provision, the failure to observe which on the part of the assignor might cause, and in fact appears in the present case to have actually caused, considerable prejudice to the other contracting party. Part of the consideration for the release lay in the fact as recited that the assignor was indebted to the several parties and for the several amounts set forth in the schedule to the deed, which debts had been adjusted by the assignees, and that the assignor had no other creditors “save and except a few small accounts not exceeding £100 sterling” which the assignees undertook to liquidate provided they did not exceed that sum. This appears to me a provision of considerable importance ; for the fact that there were no other outstanding debts might be an important element in inducing the assignees to undertake the working out of the estate. As a matter of fact it appears that there were several other debts owing by the defendant at the time, and of which he has subsequently admitted the correctness by allowing judgment to go against him by default ; in particular an amount owing to Dewhurst for legal expenses and another owing to Sim for salary, amounting together to over £300. Besides these, there were certain sums owing to Messrs. Graham and Haarhoff and Rhodes for legal expenses, and there were small debts slightly exceeding the sum of £100, which have nevertheless been liquidated by the plaintiffs. as has also the bill of Rhodes for about £80, legal expenses. The firm of Haarhoff Brothers, and the individual members of the firm and also Mr. Graham, appear scheduled as debtors to Rintel for specific amounts, without any mention of the *contra* claim which they appear to have had against him. But putting these

items aside there remain the debts owing to Dewhurst and Sim. Whether the assignees were aware at the time of the existence and nature of these claims may perhaps be open to doubt; but I think the deed must speak for itself, and that if Mr. Rintel desired to protect himself, and insure to himself the benefit of the release, it was clearly his duty to schedule them. He says that they were not ordinary commercial debts; but there is nothing in the deed limiting the schedule to debts of this kind, or allowing the debtor to omit any legal claims against him of whatsoever nature. These debts not having been scheduled, it seems clear that the consideration for the release has partially failed, and therefore, in accordance with the decision of this Court in the case of *Harvey vs. Crawford* (October 5th, 1883), the release can no longer be set up as a bar to provisional sentence. But it is said that the plaintiffs have acquiesced in this breach of the conditions of the deed by endeavouring subsequently to arrange with the creditors in question. It appears however that as between themselves and the defendant they have always distinctly held to the terms of the deed; and any negotiations by them with the creditors omitted from the schedule, or any compromises effected with third parties, cannot affect their rights as against the defendant. Possibly if he had assisted them in the matter, they would in the cases of Sim and Dewhurst, as in the case of Rhodes, have voluntarily undertaken more than they were bound to perform, and not have insisted on their strict rights. As they do insist, they must have them. It may be unfortunate for Mr. Rintel that the proposed arrangement has fallen through, but as a man of business he must be presumed to have known the risk he ran when he prepared an imperfect schedule. If, as is stated, the estate has been already to a great extent worked out, and if the plaintiffs have partially paid themselves the amounts secured by these notes (which however is not directly alleged by the defendant) they will of course be entitled to execution only for the amount still due and owing to them, and if they take out execution for a greater amount it will be at their own peril. The present case, though falling within the principle

1883
Nov. 27.
" 30.
Dreyfus & Co.
vs. Rintel.

1883.
Nov. 27.
" 30.
Dreyfus & Co.
vs. Rintel.

of *Harvey vs. Crawford*, is certainly not so strong a case as that of *Deare and Dietz vs. Korsten* (Buch. 1868, p. 17); but on the whole I cannot do otherwise than concur in thinking that the plaintiffs are entitled to provisional sentence.

[Plaintiffs' Attorneys, STOW & CALDECOTT.
Defendant's Attorneys, HAARHOFF BROS.]

In re ESTATE OF REINACH.

Insolvency.—Liquidation and contribution account.—Ordinance 6 of 1843, sections 8, 44, 100, 109, 111.

The trustee of an insolvent estate, who had been arrested and detained in a foreign country on account of a claim connected with his administration of the estate, held not to be entitled, without special authorisation from the creditors, to charge the estate with damages sustained by him in consequence of such detention.

An objection to an attorney's taxed bill of costs on the ground that certain vouchers had been produced and the Master's allocatur given in the absence of the attorney for opposing creditors, who had attended the taxation, disallowed.

Where the property mortgaged to preferent creditors was insufficient to meet the costs of realisation, concurrent creditors are not liable pro rata on the contribution account, the disbursements incurred being chargeable, under section 8 of the Insolvent Ordinance, to the secured creditors alone.

Objections to the rate of commission charged on a liquidation and contribution account, and to the sufficiency of the vouchers for certain items filed by the trustee, referred to the Master for report.

1883.
Nov. 29.
" 30.
" —
In re Estate of
Reinach

This was an application for the confirmation of the second liquidation and first contribution account in the insolvent estate of H. Reinach: it was opposed by Messrs. Mackie Dunn

and Company, of Port Elizabeth, creditors in the estate, on the grounds (1) that certain items were unsupported by vouchers or by proper vouchers (2) that an item of £300 for the detention of Mr. Craven, the trustee, at Jacobsdaal, in the Orange Free State, was not chargeable against the estate (3) that the amount charged for balance of trustee's commission was excessive (4) that an attorney's bill of costs included in the account had not been properly taxed (5) that certain items for travelling expenses in the Free State were not chargeable against the estate (6) that the several creditors who had proved should be charged with the contribution account *pro rata* and that the same should not be charged to Mackie Dunn and Company solely. Mr. Rhodes, attorney for Mackie Dunn and Company, made an affidavit in which he stated that the said firm were preferent creditors for £2000 and the estate possessed a certain farm which had been sold by the trustee for about £2500; with reference to the bill of costs of Mr. Coryndon, the trustee's attorney, he had attended the taxation before the Master of the High Court in 1881, and had objected to certain items, the taxation of which had been postponed for the production of vouchers, but those items had subsequently been taxed and allowed without notice to the deponent. He specified certain items in this bill which he submitted had been improperly allowed, and other items in the account which were not supported by proper vouchers, or were not chargeable against the estate, including the trustee's claim for detention at Jacobsdaal for sixty days at £5 a day, and the commission on the sale of immovables, which had been charged at 5 per cent. There was also an affidavit by Mr. Macfarlane, a partner in the above-named firm, going in detail into the grounds of the various objections taken to the account. In reply, the trustee, Mr. Craven, stated that the estate was sequestrated and he was appointed sole trustee in 1875; in October of that year he was arrested at the instance of the insolvent at Jacobsdaal, in the Orange Free State, and was detained there sixty days, the alleged ground of action being connected with the farm Magersfontein, situated in the Free State, which was the principal asset in the estate, and was claimed by the wife of the insolvent. The first liquidation account was filed

1883.
Nov. 29.
" 30.

*In re Estate of
Reinach.*

1883.
Nov. 29.
" 30.
—
In re Estate of
Reinach.

in April, 1876, and in the following August, after opposition by Mackie Dunn and Company, was confirmed by the High Court. A long series of actions had subsequently been necessary in order to obtain title to the farm Magersfontein and deliver transfer to the purchaser. He stated with regard to the items now objected to that no objections were lodged with the Master while the account was lying for inspection as prescribed by law, and that he had consequently no opportunity of appearing before the Master in support of the same and of answering the objections in detail, which he would have been able to do, as the disbursements in question had been duly made on behalf of the estate. With regard to the claim for detention at Jacobsdaal, all the circumstances, and the heavy losses which he had in consequence incurred, had been fully explained when the first account was debated, and he had then shewn that he was arrested while returning to Kimberley for the express purpose of winding up the estate; in the first *interim* account he had however merely charged for actual disbursements while a prisoner at Jacobsdaal, amounting to £96, as at that time he was engaged in certain heavy law-suits on behalf of the estate, and while they were still pending he was advised to charge only his actual expenses incurred to date, and to reserve the items now in debate till the estate was practically closed. As to the commission objected to, it had been duly allowed by the Master in view of the exceptionally heavy duties which had devolved on the trustee in the administration of the estate. An affidavit was also filed by Mr. W. P. Hutton, Registrar of the Eastern Districts Court and formerly Master of the High Court, in which he stated that Mr. Coryndon's bill of costs had been duly taxed by him in the presence of Mr. Rhodes, and that vouchers for every item objected to had been produced before his *allocatur* was placed on the bill. With reference to the second account he stated that, exercising his discretion as Master in awarding a reasonable compensation to the trustee for his care and diligence, he considered the amount asked for by the trustee was only fair and reasonable for the work done, and the time and labour bestowed. In reply to this, Mr. Rhodes stated that the

vouchers in question had not been produced, nor the *allocatur* given, in his presence, and, as he was not aware it was given till it was filed on a payment voucher attached to the present account, he had no opportunity of bringing the taxation under review.

1883.
Nov. 29.
" 30.
In re Estate of
Reinach.

Forster, for the opposing creditors, referred to certain items in the account for which there were no vouchers, or for which the vouchers were inadequate. Some of the vouchers were merely cheques payable to bearer, but for a cheque to be a proper voucher under section 100 of the Insolvent Ordinance it should be payable to order and express the cause of payment. As to the £300 claimed for detention at Jacobsdaal, the trustee had already been paid his expenses out of pocket, and this was a claim for damages not chargeable against the estate. It appeared from the trustee's report that he was arrested at the suit of the wife of the insolvent; nothing came of the action, and he could have claimed damages against her. A trustee undertook certain business for certain remuneration, and if he were wrongfully arrested he could not claim damages from the estate. The only remuneration which the trustee could claim was his commission on the assets realised; he referred to section 44 of the Insolvent Ordinance and *re De Koek's Estate*, Buch. 1868, 252. If a trustee were arrested, and had no course of action against the arrestor, *prima facie* the arrest was his own fault and the estate was not liable for the consequences; if this were a reasonable charge it should be authorised by a special resolution of creditors. As to commission, the trustee had charged at the rate of 5 per cent. on the sale of immovables and had also charged commission on the disbursements for which the creditors had been made liable in the contribution account. As to Coryndon's bill of costs, one item of over £100 had never been properly taxed, and with regard to the rest the vouchers had been produced and the *allocatur* affixed behind the back of the attorney for the creditors. With regard to the contribution account, he referred to section 8 of the Ordinance, and contended that it should be charged *pro rata* against all the creditors. Mackie Dunn and Com-

1883.
Nov. 29.
" 30.
—
In re Estate of
Reinach.

pany had a general bond on the insolvent's estate, but no special mortgage on the property entitling the trustee to charge against them exclusively.

Hoskyns, C.P., for the trustee, said as to the first objection the only ground disclosed on the affidavits was that the cheques in question were not made payable to order, but it was not required by the Ordinance that they should be in that form. The explanations given in Mr. Craven's affidavit were reasonable, and if further explanation were required he ought, in the special circumstances, to have an opportunity of giving it *viva voce*. The objecting creditor should have appeared at the Master's Office, while the account was lying there, and raised these points then. Under section 44, the trustee's remuneration was not confined to commission on the assets passing through his hands; he was entitled to "reasonable compensation" for the time and trouble expended on the administration of the estate. As to *re De Kock's Estate*, there was nothing extraordinary in that estate and the trustee knew beforehand what he would have to do; the present estate was in a totally different position. In the above case, the Court was clearly influenced by the circumstance that the journey, the expenses of which were disallowed, was contemplated at the time of the appointment; if it was considered in point, the former decision of the Recorder here, in confirming the first account in this estate, might be taken to have overruled it. The question of special remuneration had been reserved for the second account, and the Master, in allowing the sum objected to, had exercised a discretion with which the Court would not interfere. As to the commission, the trustee had at first charged $2\frac{1}{2}$ per cent. on the immovables, not knowing the expenses and difficulties he would subsequently have to incur. He now charged 5 per cent. on all the moneys administered by him; if a trustee could not charge on a contribution account, in a case where there were no assets he would incur expenses and obtain no remuneration for his administration. He admitted that commission could only be charged on amounts actually disbursed to date, and that in this respect the account required amendment. As to the last objection, Mackie Dunn and Company had a general bond on the estate, which was in the

nature of a special security, on insolvency supervening, within the true meaning of section 8. They were secured creditors and had proved as "preferent," and had to be satisfied before the concurrent creditors could receive anything; they were therefore solely liable on the contribution account.

1883.
Nov. 29.
" 30.
In re Estate of
Reinach.

THE COURT held, as to the objections to certain items in the account on the ground that they were not properly supported by vouchers, that the account must be referred to the Master to report whether the vouchers were sufficient; the second objection must be sustained, on the ground that the claim for £300 as compensation for damage sustained by the trustee owing to his arrest and detention at Jacobsdaal was not a legal charge against the estate, in the absence of any special resolution of creditors authorising the same; the third objection was referred to the Master to report whether the commission charged was in the circumstances reasonable and proper, while as to the contribution account the trustee was directed to amend the account by including only actual disbursements up to the date of filing the account, with such commission thereon as the Master might allow. The objection to the taxed bill of attorney's costs was disallowed on the ground that, even if the Master had made a mistake in accepting the vouchers and giving his *allocatur* in the absence of the attorney for the creditors, the trustee ought not to be prejudiced on account of such mistake for which he was not responsible; the objection that the concurrent creditors ought to have been charged *pro rata* on the contribution account was also disallowed, the Court holding that, on the true construction of section 8 of the Insolvent Ordinance, the preferent creditors were solely liable for the expenses incurred. The question of costs was reserved.

[Attorney for the Trustee, CORYNDON.]
[Attorney for the Creditors, RHODES.]

KERR, N.O., vs. ALDERSON.

Compulsory sequestration.—Ordinance 6 of 1843, sections 4, 12, 17, 30.—Act 39, 1877, section 13.—148th Rule of Court.

An order having been made for the provisional sequestration of the estate of A., the debtor, who had been personally served with the summons for final adjudication, objected on the return day that the requirements of the Insolvent Ordinance had not been complied with in that (1) the provisional order had not been inserted in the Government Gazette of the Colony, but only in the local Gazette for Griqualand West (2) although the debtor had been absent from the Colony for forty days previous to the order being made copies of the summons had not been published in the Gazette and affixed at the Supreme Court (3) that the affidavit accompanying the petition did not put a value on certain securities held by the petitioning creditor (4) that the Deputy Sheriff's return upon which the petition was founded, and which stated that the only goods pointed out to him (the securities in question) were (with one exception which he valued at a small amount, wholly inadequate to satisfy the judgment) of "no market value," did not disclose any act of insolvency (5) that the petitioning creditor held other securities for the same debt, which he ought to have valued and realised. Held, that all the objections must be overruled, and that, as the Sheriff's return shewed that the debtor possessed no sufficient disposable property to satisfy the judgment, final adjudication must be ordered.

Scmble, a debtor who intends to oppose final adjudication should, in addition to filing and serving affidavits, serve on the petitioning creditor a formal statement in writing, under the 148th Rule of Court, of all the facts he intends to dispute.

On October 2nd, 1883, a provisional order was made by the High Court for the compulsory sequestration of the estate of William Alderson, on the petition of J. R. Kerr,

manager of the Kimberley Branch of the Bank of Africa, who stated that on June 15th, 1883, provisional sentence had been obtained against respondent and others on certain promissory notes for £12,881 14s. 5*d.*, with interest and costs; on the following day the respondent left the Colony and proceeded to the Orange Free State and from thence to the Transvaal State, and had since then remained out of the jurisdiction with intent to defeat or delay his creditors; the said judgment still remained wholly unsatisfied, as would appear on reference to the Deputy Sheriff's return to the writ of execution, of which a copy was annexed. The petitioner further alleged that, after the maturity and dishonour of the promissory notes in question, and on various dates between April 30th and June 13th, 1883, the respondent had transferred a large number of shares in various mining companies into the names of his wife, his father and his father-in-law, without valuable consideration, and with intent or in such manner as to defeat or delay his creditors. The Deputy Sheriff's return was as follows:—

“By virtue of the within writ I have attached the following property, to wit, 837 shares in the London and Orange Free State Exploration Company £10 fully paid up, 497 Standard Diamond Mining Company £5 fully paid up, 215 National Diamond Mining Company, Koffyfontein, £5 fully paid up, 40 Koffyfontein Diamond Mining Company £5 fully paid up, 785 London and Orange Free State Diamond Mining Company £5 fully paid up. The present marketable value of the said 837 shares in the London and Orange Free State Exploration Company is £418 10s., but owing to the depression in the market, it would be unadvisable to sell, and the other shares have at present no market value, and no other goods and chattels were either pointed out by the defendants or any of them, or after diligent search found, whereof the balance of this writ or any part thereof could be made.”

Upon this petition and return the Court made a provisional order and, the return day having been extended, the respondent, who had returned to Kimberley, was served personally with the summons for final adjudication. He now applied to set aside the provisional order, and there was a cross application by the petitioner for final adjudication. Several affidavits were filed on both sides as to the allegations, which were denied by Alderson, that he had left the jurisdiction and transferred the above-mentioned shares with intent to defeat or delay his creditors, but as the petitioner

1883.
Nov. 30.
—
Kerr rs.
Alderson.

1883.
Nov. 30.
Kerr vs.
Alderson

mainly relied not on these allegations but on the unsatisfied judgment, which was the only act of insolvency set forth in the summons served on the respondent, the effect of the affidavits in question became comparatively unimportant to the substantial issue between the parties. With regard to the amount of the judgment it was alleged by Alderson that the shares referred to in the Deputy Sheriff's return had been deposited with the Bank by himself and the other parties liable on the notes as collateral security for the due payment of the same; he further alleged that the Bank held other securities, which had been hypothecated by his co-debtors, and of which he was unable to state the value. This latter allegation however was denied by the petitioner, who stated that the securities in question were deposited in respect of other liabilities of the pledgor's, which liabilities they were inadequate to cover. An affidavit was also filed by Alderson's attorney, Mr. Dewhurst, to the effect that the provisional order for sequestration had not been advertised in the *Government Gazette* of the Cape Colony, as required by section 12 of Ordinance 6 of 1843, and that the summons for final adjudication had not been advertised either in the local *Gazette* for Griqualand West, or in the *Government Gazette*, neither had it been posted on the doors of the Supreme Court as required by section 17 of the said Ordinance. In reply to this, Mr. Caldecott, one of the attorneys for the petitioner, stated that the provisional order had been duly served on the acting master of the High Court and was subsequently published in the local *Government Gazette*, as would appear from the copy annexed, while the summons had been served on the respondent personally. Mr. Kennedy, acting Master of the High Court, also made an affidavit in which he stated "that it is not the practice here to advertize "notices of provisional sequestration in terms of orders "granted by this Honorable Court in the *Government Gazette* "of this Colony unless specially ordered by the Court, "advertisement of the same in the local *Gazette* published "by authority having been always considered sufficient."

Levey, in support of the application to set aside the provisional order, referred to *Simpson & Company vs. Fleck*,

3 Menz. 213, and submitted that as the summons set out only one ground of insolvency, namely, the unsatisfied judgment, the petitioner could not, at all events without amendment of the summons, rely upon the other grounds set forth in the petition.

1883.
Nov. 30.
—
Kerr vs.
Alderson.

LAURENCE, J. :—In the present case a copy of the petition was served with the summons and therefore Alderson had notice of all the acts of insolvency alleged, and he has dealt with all of them in his affidavits.

Levey said the first ground of the present application was that the provisional order had not been notified in the *Government Gazette*, as required by section 12 of the Insolvent Ordinance, and this omission was not covered by the advertisement in the local *Gazette*. He contended that anyone could come and point out to the Court that this notice, which was doubtless required in the interest of creditors, had not been given, and the failure to give it was sufficient to prevent a final order being made. Secondly, as the debtor had been forty days absent from his usual place of residence in the Colony at the time of the sequestration, it was necessary, by section 17 of the Ordinance, for the summons for final adjudication to be published in the *Gazette* and affixed to the door of the Supreme Court.

LAURENCE, J. :—Surely that does not apply where personal service has been effected ?

BUCHANAN, J.P. :—It appears from the affidavits that Alderson swore in a former matter that he had no domicile within the Colony ; this proviso therefore does not seem to apply.

Levey said the third objection was that, under section 30 of the Ordinance, the affidavit accompanying the petition was bad as not putting a valuation upon the securities which it was admitted were held by the petitioner. Then as to the liability on the judgment, no doubt Alderson was personally liable for the whole amount, but credit should have been

1883.
Nov. 30.
—
Kerr vs.
Alderson.

given by the Bank for all the securities held against the debt; *Voet*, xlv. 2, 4; *Van der Keesel*, Th. 507; *Burge on Suretyship*, 407; *Serrurier vs. Langeveld*, 1 Menz. 316; *Van der Poel vs. Langeman*, 3 Menz. 307. The property pledged by the other co-debtors should have been valued and realised before these proceedings were taken. The Bank should have put a value on the securities they held; *Stewart & Company vs. Ferguson*, 2 Buch. E. D. C. 245; *Dell vs. Caro*, High Court, May, 1883, High Court Reports, vol. i. p. 393; *Marsh vs. Makein*, 2 Juta, 104; *Kotze vs. Meyer*, 1 Menz. 466. The sequestration had been obtained on an incorrect statement of facts, and the Sheriff's return was bad, the property of the co-debtors not having been set out and valued.

Forster (with him *Lange*), for the petitioner, contended that the objection as to non-publication was cured by the appearance of the respondent, who should have taken this as a preliminary point *in limine* before going into the merits; moreover these were creditors' objections, and not open to the insolvent who had been personally served. The Sheriff's return clearly disclosed an act of insolvency; the securities pledged and attached under the writ were not sufficient to cover half the amount due for interest alone on these notes. *Stewart & Company vs. Ferguson* was in the petitioner's favour, as it was perfectly clear in the present case that sufficient property had not been pointed out by any of the debtors or discovered by the Sheriff. The *onus* was on the debtor to point out property out of which the amount of the writ could be made, and the return here clearly did not shew sufficient "disposable property," and therefore disclosed an act of insolvency under section 4 of the Ordinance of 1843. As to *Marsh vs. Makein*, the property in that case was admittedly of sufficient value to discharge the debt. No specific notice had been given of the objections raised as required by the 148th Rule of Court.

Levey replied that there had been sufficient notice of these objections in the affidavits filed and served on behalf of Alderson, and referred to *In re Harper*, 2 Buch. E. D. C. 103. He contended that, notwithstanding the rule referred to, any legal objections as to the validity of the summons could be taken on the return day without formal notice.

BUCHANAN, J.P.:—I am of opinion that the application to supersede the provisional order for the sequestration of this estate must be refused. In the first place, it appears to me exceedingly doubtful whether the affidavits which have been served on the petitioner can be held to be a sufficient “statement in writing,” within the meaning of the 148th Rule of Court, of the facts which the debtor intends to dispute, and whether in the absence of a formal notice under that rule it is competent to the Court to entertain or give any effect to the grounds of objection which have been urged. In the case of *Leeuwner vs. Meehan*, 3 Menz. 322, it was clearly laid down that the Rule of Court in question applied to proceedings under the present Insolvent Ordinance, and that, in the absence of such notice as is therein required, “the debtor is debarred from disputing, and the petitioning creditor is not required to prove, any of the facts alleged in the summons.” This case was followed in this Court a year or two ago in the case of the *Bank of Africa vs. Goldsmith*, and the decision of the Eastern Districts Court in the recent case of *In re Harper* is in no way inconsistent with it, as in that case the Court abstained from expressing any opinion as to the construction and effect of the 148th Rule of Court. But even if this preliminary difficulty in the way of entertaining the objections could be surmounted, I am of opinion that none of the points which have been raised have been substantiated. As to the first point, that the order for sequestration was not inserted in the *Government Gazette*, published at Cape Town, it was the practice in Griqualand West previous to annexation to insert such orders in the then existing local *Government Gazette*, and since annexation there has been a local newspaper selected by Government as the medium in which Government and Court notices are “inserted by authority.” In the first place, it appears to me that this provision of section 12 of the Insolvent Ordinance is discretionary and not imperative; in the second, that its precise provisions cannot be held to exactly apply to Griqualand West, under its exceptional circumstances; and in the third that, as there was personal service effected, and it is not contested that the object of the advertisement in whatever form published, has been secured, this personal

1883.
Nov. 30.
—
Kerr vs.
Alderson.

1883.
Nov. 30.
—
Kerr vs.
Alderson.

service would be sufficient to cover any defect otherwise existing. The section only requires the publication of the order, without stating any effect of non-publication; moreover, even if it were open to a creditor to take such objection, it seems very doubtful whether it could be open to the debtor himself, and where he has not been damnified, but appears in answer to the summons. As to the second point, Alderson has himself on a former occasion successfully pleaded non-jurisdiction in answer to an action in this Court, on the ground that he had abandoned his former domicile in Griqualand West, and, the object of the notice and advertisement required by the 17th section being to secure appearance, the defect, if any, was cured by personal service unobjected to. The third objection raised by the debtor is that, under the 30th section, the petitioner for compulsory sequestration is required, in the affidavit accompanying the petition, to put a value on the securities held by him. But this if not done in the petition itself was done in the Sheriff's return, which returns the shares held in security as practically valueless, and the value has also been fully discussed in the affidavits filed on both sides, and it cannot be said that, in his opposition to final adjudication, the debtor has been under any embarrassment on this account. The section, moreover, is merely directory, and makes no provision for the consequence of any omission in this respect on the part of the petitioning creditor. The fourth and last objection which we have to consider amounts to an impeachment of the sufficiency of the Sheriff's return, and an allegation that the Bank hold sufficient securities to meet this debt which have not been excused, whether belonging to Alderson or his co-debtors on these notes. But from the affidavits it seems to me clear that the securities held for this particular debt (independent of securities specially held for other private liabilities of the co-obligants) have proved quite insufficient to meet even the interest. There is therefore before us practically a return of *nulla bona*, and the judgment on which the petition was founded remains wholly unsatisfied. It is unnecessary to express any opinion on the other alleged acts of insolvency, which were not mentioned in the summons, and on which

counsel for the petitioner has not relied in his argument. For the reasons stated, the objections which have been raised must be disallowed, and an order made for the final adjudication of the estate.

1883.
Nov. 30.
—
Kerr vs.
Alderson.

LAURENCE, J.:—The first objection which has been taken to the final adjudication of this estate is that the provisional order was not published in the *Government Gazette* of the Colony. It is admitted that it was not published in that paper, but only in the local *Gazette*, or authorised medium for Government notices, and the acting Master states that this is in accordance with practice, and that the publication of such orders, when made by this Court, in the *Government Gazette* as well has not been customary, unless specially ordered by the Court. The objection is based on section 12 of the Insolvent Ordinance, which was enacted in 1843, when the Supreme Court was the only Court in the Colony having jurisdiction in matters of insolvency. At the present time this Court has a concurrent jurisdiction in such matters in Griqualand West; and the powers and duties of the Master of the Supreme Court as laid down in the Ordinance, including that of publishing this notice as provided in section 12, are exercised in Griqualand West, under the provisions of the Griqualand West Annexation Act, Act 39 of 1877, sect. 13, by the Master of the High Court. I think it might be contended with considerable force, by a sort of application of the *cy près* doctrine, that the Master of the High Court sufficiently discharges the duty of notification thus enjoined upon him by a notification in the local *Gazette*; but without giving any decision on this point, I certainly think that as the object of such notification is to inform the creditors, and all parties interested in the estate, it is not competent for the insolvent himself, who has been personally served with the summons, and who has appeared on that service, to raise an objection of this kind. The second objection is that, as Alderson was absent from the Colony for forty days previous to the provisional order being made, it was necessary, under section 17, for the summons to have been published in the *Gazette* and affixed to the door of the Supreme Court. As I read this section, this proviso

1883.
Nov. 30.
—
Kerr vs.
Alderson.

seems only to apply to cases where, owing to the absence of the insolvent from the jurisdiction, service has only been effected on him by some method other than personal, as for instance by edictal citation, and therefore there was no necessity for such publication in the present case, where the debtor has returned to the jurisdiction and there has been personal service. There is however another ground upon which it seems clear that this objection must be overruled, namely, the admitted fact that the debtor recently deposed, when summoned in this Court, that he had given up his colonial domicile, and had no "usual place of residence or business within the Colony"; hence he could not have been absent for forty days from a place which on his own shewing did not exist, and the proviso therefore can have no application to his case, and the objection based on it must fail. As to the third ground of objection, under section 30, that the affidavit accompanying the petition did not put a value on the securities held by the petitioner, although the failure to assign such value may perhaps affect the rights of the creditor in the administration of the estate, I find no provision that in the event of such failure the Court shall refuse to consider, and be debarred from making any order on, the petition accompanied by such affidavit. I think therefore that the preliminary objections must be overruled and that the only really substantial ground of objection which has been urged is the allegation that the Bank held securities for the unsatisfied debt, which is the act of insolvency on which the petitioner relies, and that the Sheriff's return does not disclose any act of insolvency. On the whole however it seems clear that the return does disclose the absence of "sufficient disposable property" to satisfy the debt; for the Deputy Sheriff states that the shares referred to in his return "have at present no market value"; and property which has no market value cannot be disposed of. As to the allegation that the Bank hold other securities which they should have applied to the satisfaction of this debt or set forth in the affidavit, I do not think there is any proof that such is the case. There is a debt to the Bank of over £12,000, for which Alderson is personally liable, and there is ample evidence that his goods are insufficient to

satisfy this debt, or even any substantial portion of it. I therefore concur in thinking that the objections which he has raised must be disallowed, and his estate adjudged sequestrated, with costs.

1883.
Nov. 30.
Kerr vs.
Alderson.

[Attorneys for Petitioning Creditor, STOW & CALDECOTT.]
[Attorney for Insolvent, DEWHURST.]

DREYFUS AND COMPANY vs. CORNWALL, N.O.
In re DEWHURST vs. RINTEL.—SIM vs. RINTEL.

Sheriff's sale.—Reasonable advertisement.—Judgment creditor.

Dewhurst and Sim, judgment creditors, had previously attached certain immovable property of the debtor Rintel. Dreyfus and Company, large creditors of Rintel, after the sale had been duly advertised and the day before the property was to have been sold in execution, applied in Chambers and obtained a rule *nisi* interdicting the sale. On November 30th, 1883, that rule was discharged. On the same day (November 30th) Dreyfus and Company got provisional judgment against Rintel for £6125 with costs. On December 3rd, 1883, the Deputy Sheriff, Cornwall, advertised in the local papers that the sale would take place on December 5th, 1883. He had adopted this course as sufficient after communicating with the Deputy Sheriff of Albany, whom he was advised by the High Sheriff to consult in all such matters. The Sheriff of Albany had telegraphed that under the circumstances one advertisement would be enough but he did not advise how long before the sale. On December 4th, Dreyfus and Company applied to stop the sale on the ground that the advertisement gave only forty-eight hours' notice of the sale, and that that was not a reasonable time. The property would go at a very low figure, and their interests would be prejudiced. They contended that as long an advertisement as the original one, which fell when the rule *nisi* was granted, ought to be made; or if not, then a much longer one than forty-eight hours.

1883.
Dec. 1.
Dreyfus & Co.
vs. Cornwall.

1883.
Dec. 4.

Dreyfus & Co.
vs. Cornwall.

Forster, for the applicants.

Hoskyns, C.P., for Sim.

Levey, for Dewhurst.

THE COURT declined to interfere with the discretion of the Deputy Sheriff, and held that the advertisement was in the circumstances a sufficient notice of the sale, and that the vigilant creditors, who had obtained the attachment, ought not to be kept out of their rights any longer. The applicants, who were represented on the spot, could protect themselves by buying in the property if they thought fit.

[Applicants' Attorneys, STOW & CALDECOTT;
Attorneys for Sim, HAARHOFF BROTHERS;
DEWHURST in person.]

BANK OF AFRICA *vs.* KIMBERLEY MINING BOARD AND GEM DIAMOND MINING COMPANY (LIMITED).

Provisional Sentence. — Irregular service of summons. — Giving of time.—Novation.—Discharge of endorser by election to charge maker.

Provisional sentence refused against the maker of certain promissory notes, who had not been served with a true copy of the original summons, the copy served failing to disclose the signature of the Registrar, and the name of the plaintiff's attorney.

Provisional sentence granted against the endorser of the same notes, notwithstanding allegations that the holder had elected to charge the maker only and that there had been a novation of contract as between him and the endorser, such allegations not being substantiated by the affidavits.

1883.
Dec. 6.
" 7.

Bank of Africa
vs. Kimberley
Mining Board
and Gem
Diamond Mining
Co.

Provisional sentence was prayed on three promissory notes made by the Kimberley Mining Board in favour of the Gem Diamond Mining Company, and endorsed by that Company, amounting in all to £11,240, with interest and costs.

Hopley, for the Mining Board, objected to an irregularity

in the service of the summons on his client. He produced the copy served on the Chairman of the Mining Board, and pointed out that it was not a true copy of the original, in that it did not purport to be signed by the Registrar, nor did the name of the plaintiffs' attorney appear upon it.

1883.
Dec. 6.
" 7.
Bank of Africa
vs. Kimberley
Mining Board
and Gem
Diamond Mining
Co.

THE COURT intimating that these irregularities were fatal, the summons was withdrawn against the Mining Board, who were allowed their costs of appearance.

Hoskyns, C.P., for the plaintiffs, produced the notes upon which were endorsed by the Gem Company acceptances of notices of dishonour, and prayed provisional sentence against the Company.

The affidavits shewed that the notes were passed for a direct liability of the Mining Board to the Gem Company, who endorsed them for the purpose of getting them discounted by the plaintiffs. When the notes fell due, in January, February and March, 1883, the Mining Board was in difficulties and could not meet them and the endorsers accepted notices of dishonour. Early in June, 1883, the Gem Company passed an hypothecation over their claims in favour of the plaintiffs for £11,500, as security for the payment of these notes, and at the end of June, 1883, it was agreed in writing between the plaintiffs and the Gem Company that the plaintiffs would hold over the notes and give time to the Company on condition that the Company would apply all their net profits, over and above necessary working expenses, to the payment of these notes, and would not part with such profits for any other purpose without the written consent of the plaintiffs until the notes were fully paid. In their half-yearly statement on June 30th, 1883, the plaintiff Bank had included this liability under the head of "Advances to and acceptances by Public Bodies" and not under the head of "Bills and Notes past due," but they alleged in their affidavit that this was done without any intention of releasing the endorsers of the notes from any liability on them, the amount being so accounted for in the half-yearly statement merely because the Mining Board was primarily liable for it. It was also proved on affidavit that

1883.
Dec. 6.
" 7.
Bank of Africa
vs. Kimberley
Mining Board
and Gem
Diamond Mining
Co.

after June 30th, 1883, the Gem Company had frequently tried to compromise or arrange the claim against them in this matter. It was alleged for the defendants that the agreement of June had been faithfully observed by them, and for the plaintiffs that the Bank had never abated any of its rights against the defendant Company, and that a reasonable time under the agreement had elapsed.

Forster, for the defendant, urged that the placing these liabilities, after their maturity, to the debit of the Mining Board, as the plaintiffs had done in their half-yearly statement, was an arrangement behind the back of the endorsers, which released them from liability. The Bank had made their election to charge the maker, and could not afterwards charge the endorser. He further contended that the plaintiffs could not recover on the notes, because the arrangement made with the defendants amounted to a novation, and the action, if any, should have been taken on the new contract, the terms of which however the defendants had strictly complied with. The debiting to the Board in the published statement was also strong evidence of the alleged novation.

Hoskyns, C.P., who was called upon to reply on the second point only, contended that there was no intention to novate, and that the arrangement was merely one to give a reasonable time to the defendants, on their observing certain conditions. There was no consideration for any fresh contract. It was at most a mere pact. Even if it were a *pactum de non petendo* for a reasonable time, such reasonable time had elapsed.

BUCHANAN, J.P.:—With regard to the first point which has been raised on the part of the defence, it has not pressed the Court and I do not think it necessary to say more about it than that the reason for placing the amount of these bills in the half-yearly statement of the Bank under the head of "Advances to public bodies" seems to have been sufficiently explained in the further affidavit of the manager. I do not think that there was anything in this which could be held to release the defendant Company from their liability as endorsers of the notes in question. The real question in the case and the material point of the defence is the alleged

novation. Now, as laid down by *Van der Linden* (pp. 268, 269), where novation of a contract is pleaded as a defence, the evidence of novation must be clear and distinct. Such, however, I do not find to be the case here; there is no clear proof that the plaintiff ever made any more definite arrangement with the defendants than that, on certain conditions, he would not sue on the notes for a reasonable time. The last of the notes was due in March last, the arrangement was made in July, it is not alleged that there has been any direct breach of the conditions, and the only remaining question is whether the defendants have been allowed a reasonable time. I think that from July to December must in the circumstances be regarded as a reasonable time and that the plaintiffs are therefore entitled to provisional sentence.

1883.
Dec. 6.
" 7.

Bank of Africa
vs. Kimberley
Mining Board
and Gem
Diamond Mining
Co.

LAURENCE, J.:—I concur. I think no new arrangement has been proved as between the maker of these notes and the present plaintiff of such a nature as would discharge the indorser, who is not altogether in the position of a surety. The point was a good deal discussed in this Court in the case of *Wright vs. Roberts* (1882), and I think it was then clearly shewn that by the law of this Colony, which is not so favourable in this respect to indorsers as the English law, there is no presumption that a new arrangement made with the maker necessarily prejudices the indorser, but on the contrary, if the new arrangement with the former is to discharge the latter, the prejudice must be shewn. I think on the whole the Bank was justified in treating the amount of these notes, in its published statement, as a secured advance to a public body, which in one sense they were, and that the liability of the indorsers, which arose on their receiving due notice of dishonour, cannot be held to have been released by this proceeding on the part of the Bank. With regard to the novation I concur in thinking it has not been proved. If there was any pact *de non petendo* it was only an agreement not to issue process on these notes for a reasonable time, which has now elapsed. Any undertaking not to sue until the success or failure of the projected Mining Board Loan, such as has been suggested, would in

1883.
Dec. 6.
— 7.

Bank of Africa
vs. Kimberley
Mining Board
and Gem
Diamond Mining
Co.

the circumstances be improbable in itself and would require to be clearly proved, and there is no such proof in the correspondence between the parties which is before the Court.

Provisional sentence was accordingly granted, with costs.

[Plaintiffs' Attorneys, STOW & CALDECOTT.]
[Defendants' Attorney, DEWHURST.]

LONDON AND SOUTH AFRICAN EXPLORATION COMPANY,
LIMITED, vs. DUTOITSPAN MINING BOARD.

Interdict.—Slander of title.—Mines situate on private lands.—Abandonment of claims.—Powers of Mining Board.—Proclamations 71 of 1871 and 8 of 1880, and Ordinances 10 of 1874 and 15 of 1879, Griqualand West.—Act 19, 1883, sections 78, 39, 65, 66.

Interdict granted on a well grounded apprehension of interference with proprietary rights.

Under the local Ordinances and Proclamations can there be an abandonment by the proprietors of claims situate on private lands where there is no reservation of minerals in favour of the Crown? (Not decided.)

Per LAURENCE J.:—*The Secretary of a Mining Board is not ex officio the proper officer to give notices to the owners of abandoned claims under section 78 of Act 19, 1883.*

1883.
Dec. 6.

London and
South African
Exploration Co.
vs. Dutoitspan
Mining Board.

This was an application for an interdict to restrain the respondents from interfering with or assuming to interfere with the applicants in the exercise of their proprietary rights over the farm Dorstfontein. It appeared from the affidavits that the applicants were the owners of the farm Dorstfontein upon which the Dutoitspan mine is situated; that Mr. R. M. Roberts, acting under instructions from the respondent Board (of which he was the secretary), and upon appointment by them as the officer to give such notice,

under section 78 of Act 19, 1883, proceeded, on November 17th, 1883, to give notice to the applicants calling upon them to declare their willingness or otherwise to take upon themselves all the liabilities and responsibilities of an ordinary claim-holder in respect of certain claims, the numbers of which were given, situated in the Dutoitspan mine, which the respondents alleged were abandoned. Thereupon a correspondence ensued between the applicants and the respondents in which the former denied that the ground indicated consisted of "abandoned claims" as defined by law, and also denied Roberts's appointment and his right to address them on the subject. The applicants' manager was also the Registrar of Claims for Dutoitspan, and Roberts stated in one of his letters that he had received a letter from the Registrar's Office declaring these claims to be abandoned. The section of the Act under which the proceedings had been taken is as follows:—"Every abandoned claim in any mine, situate upon land the title to which is not subject to any reservation of minerals or precious stones in favour of the Crown, shall become the property of the Mining Board, body, or officer mentioned in the 68th section of this Act, under and by virtue of the provisions of the said section, unless the owner of such land shall, within thirty days after he shall have received written notice from any officer duly appointed in that behalf of the fact that such claim has been abandoned, signify to such officer in writing his willingness to take upon himself all the liabilities and responsibilities of an ordinary claim holder in respect of such claim. In the event of his so signifying his willingness as aforesaid, he shall thereupon become and be subject to all the laws, rules, and regulations applicable to other claim holders in such mine in respect of such claim."

1883.
Dec. 6.

London and
South African
Exploration Co.
vs. Dutoitspan
Mining Board.

Hoskyns, C.P. (with him *Forster* and *Lange*), for the applicants, said that their object was to obtain an injunction of the nature of a *quia timet*, and for "quiet enjoyment" of their property. Unless steps were taken now the ground in question would *ipso iure* become the property of the Board and they would exercise proprietary rights over it, under the powers conferred on them by sections 78, 66, 65, of Act

1883.
Dec. 6.

London and
South African
Exploration Co.
vs. Dutoitspan
Mining Board.

19, 1883. By virtue of these powers the Board might come in, perhaps after a year's interval, and proceed to deal with the property. The applicants' title was in danger of being slandered and on that ground they had a right to prevent the anticipated damage. The secretary of the Board had no right to issue the notice. It must be issued by an "officer duly appointed in that behalf" and that was not equivalent to "the secretary of the Mining Board for the time being." Section 39 of the Act shewed what powers Mining Boards possess, and the appointment of such officer was not among them. The mere fact that the Board professed to have the power of acquiring the applicants' property would cause them irreparable damage. An injunction would be granted where the applicant's title was questioned; *Joyce on Injunctions*, i. p. 4; *Van der Linden*, 441. Here the applicants had a clear right and a well-grounded apprehension that an act prejudicial to their rights would be done, the intention of the respondents clearly being either to acquire their property or to force them into the onerous position of claimholders. Even if Roberts's appointment were without flaw, the ground in question was not "abandoned claims" within the meaning of the Act. Prior to 1883 the only laws governing the Dutoitspan and Bultfontein Mines were Proclamation 71 of 1871, Ordinance 10 of 1874 (without the Schedule) and Ordinance 15 of 1879; Proclamation 8 of 1880 had no application to these mines. No rules and regulations applying to them had ever been framed under Ordinance 10 of 1874, and there was nothing between Proclamation 71 of 1871, and Ordinance 15 of 1879, which was retrospective in its operation, but only so far as private rights were not in conflict with the Schedule to Ordinance 10 of 1874, which was then to that extent only applied to these mines. As to the cancellation by the Administrator's Proclamation 8 of 1880 of the Schedule to Ordinance 10 of 1874, so far as it concerned Dutoitspan and Bultfontein it was obviously *ultra vires*. There being no provision for "abandoned claims," and no definition of "abandoned claims," previous to the Act of 1883, which could apply to Dutoitspan, it followed that, as alleged by Kilgour, the applicants' manager, in his affidavit, any unworked ground there situate was not an "abandoned

claim" within the meaning of section 65 of Act 19, 1883. Roberts's notice was therefore absolutely *ultra vires* and prejudiced the applicants by threatening their title.

Forster followed on the same side:—The applicants are forced to take these steps, since otherwise their property would pass away by operation of law. The Court would consider on which side the balance of damage was. If the *interim* interdict were refused the applicants would be seriously damaged, whereas if it were granted, pending an action to be brought by the applicants, the respondents would suffer no harm. Roberts was wholly unauthorised to give the notices in question. The officer for that purpose must be appointed by Government.

Hopley (with him *Levey*), *contra*:—As to the balance of damage, the facts are in favour of the respondents. The dispute is about high ground standing in the mine, which is a continuous danger to the claimholders, whom the Board represents, and which must be worked down as soon as possible. The present application is entirely premature, for either the Board are only doing what the law allows, or they will at some future date trespass on the applicants' property when their proceedings can be restrained. If the claims are properly "abandoned claims," the respondents are only exercising their rights under the Act of 1883; if they are not claims at all but virgin soil, or if, having been claims, they are not, legally speaking, abandoned claims, then if the respondents attempt to exercise proprietary rights over these portions of ground, they will be trespassers and liable to damages as such. If the respondents have slandered the title of the applicants they can have their remedy by an action founded on the tort. Thus in no aspect of the matter are the applicants remediless. At the present stage of the proceedings the respondents are not claiming the property of the applicants, but are merely calling on them to declare that they are the owners of these claims and to undertake the liabilities of any other owner of claims. If they do not undertake these liabilities then, no doubt, the respondents will deal with the ground as the law allows them to do; but the applicants are in no worse position in being put to this election than any other owner of

1883.
Dec. 6.

London and
South African
Exploration Co.
vs. Dutoitspan
Mining Board.

1883.
Dec. 6.
—
London and
South African
Exploration Co.
vs. Dutoitspan
Mining Board.

property on which mines have been proclaimed open would be in a similar case. As to the abandonment of the claims, it is clear from clause 10 of section 3 of the Schedule to Ordinance 10, 1874, that such abandonment is contemplated, and this schedule is made applicable to Dutoitspan mine by Ordinance 15, 1879. Private rights are not affected by any enactments in the schedule about abandonment, because it is only the monthly tenure—the right to work—which is abandoned by one digger and disposed of to another, and the owner receives licence money equally from both, retaining the ultimate reversion of the soil. Proclamation 8 of 1880 did not repeal the schedule to Ordinance 10, 1874, except in respect to Crown lands and private properties where there was a reservation of precious stones and minerals in favour of the Crown, and therefore did not apply to Dutoitspan. Therefore as claims could be abandoned at Dutoitspan prior to Act 19, 1883, the respondents say these claims were so abandoned, and it is not denied by the applicants' manager, the Registrar of Claims, that the respondents have a letter from his office saying they were duly abandoned. Being so abandoned "by virtue of a law heretofore in force" (see Act 19, 1883, sect. 65) the respondents treat these claims as the law allows them to do under section 78 of the Act. Thus the Court is asked to interdict the respondents from doing what the law permits. As to Roberts's appointment and right to serve the notices, he is acting for the Mining Board, who are created to look after the interests of the mine and claimholders (Act 19, 1883, sect. 66). They have appointed him and such appointment is good. But here too the applicants are in this dilemma: If Roberts is not duly appointed an interdict is not necessary, as they can simply ignore his notices, and, if he presumes to act on them, they can treat him as a trespasser. If however he is the proper officer duly appointed their contention falls to the ground, for he would under the Act be justified in his proceedings. If the applicants have been injured they have an ample remedy at law, and in such a case no interdict ought to be granted (*Maynard vs. The Colonial Bank*, 3 Menz. 593).

BUCHANAN, J.P.:—The Court does not think it necessary

to hear the *Crown Prosecutor* in reply, as we are both of opinion that the interdict must be granted. The applicants are the owners of the farm Dorstfontein on which the claims, if they are claims, are situated with reference to which the present proceedings have been instituted. I think this is a case in which it has been made out, in accordance with the requisite conditions for an interdict as laid down by *Van der Linden*, that the applicants have a well-grounded apprehension of conduct on the part of the respondents prejudicial to their rights, and that, on the other hand, there will be little, if any, prejudice to the respondents in restraining their proposed exercise of their alleged rights until the existence and nature of those rights has been clearly determined by the action which the Exploration Company propose to bring. After referring to the 78th and 66th sections of Act 19, 1883, his Lordship continued:—I think on the whole, though the point is certainly not free from doubt, the balance of argument is in favour of the construction that Mr. Roberts, the Secretary of the Mining Board, was the proper officer to give the notice referred to in section 78, and must be regarded as the duly appointed representative of the Mining Board in that behalf. But however that may be, the fact that these claims have been abandoned at all, and even the possibility of their abandonment, has been directly challenged; and I do not think it is sufficient for the respondents to content themselves with informing the Court in a vague way that they possess a document from the office of the Registrar of Claims shewing such to be the case. The very fact of the abandonment of these specific claims is at present *in dubio*, and it is a fact which can best be determined in the principal case. With regard to the argument as to the effect of Proclamation 8 of 1880 on the schedule to Ordinance 10 of 1874, so far as that schedule refers to mines on other than Crown lands, it has certainly been always understood in this Court that the Proclamation did not repeal the application of the schedule to such mines. This point, however, it is unnecessary to decide now, and it is also I think, unnecessary to decide what are the precise portions of that schedule which Ordinance 15 of 1879 made applicable to these mines, of which Dutoitspan is one. On the whole it appears to

1883.
Dec. 6.

—
London and
South African
Exploration Co.
vs. Dutoitspan
Mining Board.

1883.
Dec. 6.

London and
South African
Exploration Co.
vs. Dutoitspan
Mining Board.

me that the letter of the secretary of the Mining Board was rather an astute movement, which has been as astutely resisted in order to compel the applicants to do something and take up a decided position, one way or another, on a very important question, within the limited space of thirty days. I do not think it would have been right for the applicants, as suggested, to do nothing in the interval and wait to see what the Board would do when the time had expired. I think they were entitled, in the doubtful circumstances, and having regard to the possibility of an infringement of their proprietary rights of a serious nature, to come to the Court for an interdict, and that the balance of advantage is in favour of the interdict being granted on the applicants undertaking to bring their action for a declaration of their rights.

LAURENCE, J.:—I was at first very much disposed to regard this application as premature; but on the whole I concur in thinking that the applicants are entitled to an *interim* interdict, of the nature of an injunction *quia timet*, and I have come to this conclusion on a very simple ground to which I should prefer to confine my judgment. I think they have shewn that they are threatened by the respondents with an invasion of proprietary rights, which may prove of a very damaging nature, and that it is therefore for the respondents at all events to give some *primâ facie* proof of the legality of their proceedings. In the absence of such proof the proprietor has a clear right which the Court will protect. The respondents are professing to act under the powers and authorities conferred on Mining Boards by Act 19 of 1883, sect. 78, which provides in effect that unless the owner of property on which abandoned claims are situated, within thirty days of receiving notice from the officer duly appointed in that behalf, intimates to the Board his willingness to undertake the duties and responsibilities of a claimholder, the land in question shall become the property of the Board. The respondents, the Dutoitspan Mining Board, clearly take up the position that the notice sent to the applicants on November 17th, twenty days ago, by their secretary was a notice under the section, and that unless the applicants give the required undertaking the

property in question will vest in the respondents. They may at once, at the expiration of the thirty days, assume and exercise proprietary rights, and so impair the credit of the applicant Company, and generally proceed in a manner which may entail great injury and heavy expense. In taking up this position I think they are bound to shew that they have complied with all the requirements of the Act, that the preliminary notice has been duly given, and that their secretary was a duly appointed officer in that behalf and therefore competent to give it. I can find nothing in the section, or in the Act, to shew that this is the case, or that it is competent for the Mining Board or its secretary to assume the functions of the officer in question, and I therefore concur in thinking the applicants entitled to an *interim* interdict to restrain the respondents from proceeding on the assumption that a proper notice within the meaning of the Act has been duly given. Coming to this conclusion on these grounds, I do not think it necessary to enter into the question whether as a matter of fact the claims in question exist, or whether if they did exist they have been abandoned, or whether claims in this mine can be abandoned within the definition of abandonment contained in section 65 of the Act of 1883. On these questions there is not at present full information before the Court and I think it unnecessary and undesirable to express any opinion on them at the present stage of the case.

THE COURT therefore granted an *interim* interdict in terms of the application, putting the applicants on terms to proceed with their declaratory action forthwith, and ordered the costs to be costs in the cause. (a)

The respondents subsequently withdrew the notices and no further proceedings were taken in the premises.

[Applicant's Attorneys, STOW & CALDECOTT.
Respondent's Attorneys, HAARHOFF BROTHERS.]

(a) [Almost simultaneously with this decision a notice from the Commissioner of Crown Lands and Public Works appeared in the *Government Gazette* appointing, not the secretary of the Mining Board, but the Inspector of Mines to be the officer for the purpose of giving notices under section 78 of the Act of 1883.—ED.]

Re KIMBERLEY SHARE EXCHANGE COMPANY, LD.

Joint-stock Company—Winding-up petition.—Act 12 of 1868, section 3, sub-section 1.—Secured judgment-creditor.—354th Rule of Court.—Sittings of Court in vacation.

Where it was not shewn that the ordinary course of liquidation would not prejudice a secured judgment creditor who, before the presentation of the winding-up petition, had in execution of a judgment attached the property specially mortgaged to him and declared executable by the Court, a winding-up order was made but it was ordered that the property attached should not vest in the liquidator, and that the liquidation should proceed without prejudice to the execution sale.

Under the 354th Rule of Court, promulgated by Government Notice No. 179 of 1883, one Judge of the High Court, sitting in vacation on a day appointed by the Court during the previous term, can exercise all the powers and jurisdiction of the Court.

1883.
Dec. 10.
„ 20.
Re Kimberley
Share Exchange
Co.

On December 10th, 1883, judgment was obtained upon a mortgage bond for £500 against the above Company by one Koefoed. On the same day application was made on behalf of the Cape of Good Hope Bank for the winding up of the said Company. The petition upon which the application was founded set forth that the Company was unable to pay its debts, in proof whereof it was stated that on July 26th, 1883, the said Bank had obtained a judgment against it for £740, which judgment “has remained unpaid and unsatisfied without the consent of the said Bank for thirty days and upwards.”

Hopley appeared on behalf of the petitioner.
Levey, for the judgment creditor, opposed.

THE COURT held that it was necessary in a petition for winding up, if the petitioner relied upon sub-section 1 of

section 3 of the Act, to allege that the debt was *unpaid and unsecured*. "Unsatisfied" was merely a repetition of "unpaid." The petition was also defective in that it failed to allege that the Company was registered under Act 23 of 1861. The petition was accordingly dismissed with costs, leave being granted to file an amended petition.

Before rising, the Court intimated that Mr. Justice LAURENCE would sit alone on December 20th (during vacation) to hear this and some other pressing matters.

On December 11th Koefoed took out a writ of execution, and the property hypothecated by the bond, having been declared executable by the judgment, was duly attached.

On December 12th fresh advertisement of the intention to apply "in Chambers" for the winding up of the Company was made in the local *Gazette*. Parties interested were by the advertisement informed that the petition was lying for inspection at the offices of the petitioner's attorneys.

On December 20th (*coram* LAURENCE, J.):—

Hopley produced a new petition for a winding-up order signed and bearing date December 17th, alleging that the Company was duly registered under Act 23, 1861, and that the debt of £740 due to the Bank had without the creditor's consent remained unpaid and unsecured for more than thirty days.

Levey, for the judgment creditor, took the following preliminary objections:—(1) The Court has no *juris dictio*, there being no *quorum*. This is not a sitting in vacation, but an adjourned sitting in term and therefore one Judge is not sufficient. (2) The notice in the *Gazette* advertises an application "in Chambers," whereas this, if anything, is a sitting in open Court. (3) The notice in the *Gazette* is dated December 11th and refers to the petition, which could not have been in existence at the time, it being dated five days later.

His LORDSHIP overruled the objections, holding that the Court had power to convene itself at any time, whether in term or not, and that due notice of the present sitting having been given, and this being vacation, one Judge was em-

1883.
Dec. 10.
„ 20.
Re Kimberley
Share Exchange
Co.

1883.
Dec. 10.
" 20.
—
Re Kimberley
Share Exchange
Co.

powered under Rule of Court 354, promulgated by Government Notice No. 179, 1883, to exercise all the powers and jurisdiction vested in the Court. With regard to the second objection, there could be no prejudice to the parties on account of the technical error in the wording of the advertisement, more especially as it had been openly announced in Court that the Court would sit this day for hearing this and other cases. As to the third objection, all that was required was that the petition must be in existence at the time of the publication of the advertisement. Although the present petition was not signed till the 17th there was nothing before the Court to shew it was not open to inspection at the attorney's office on and after December 12th. In the absence of any affidavit it was impossible to come to the conclusion that there had been no petition in existence, or that a copy could not have been obtained on application being made in the ordinary way.

Levey then produced an affidavit on the merits setting forth that the property attached by the judgment creditor would not more than cover the judgment and costs, and that no one would be benefited, while the judgment creditor would be seriously damaged, by a postponement in realising it, which would be the result of a liquidation, in itself involving an additional expense and charge on the estate. It was therefore prayed that, if the winding-up order were made, it might be without prejudice to the execution sale.

An answering affidavit by one of the trustees of the Company set forth that forcing the sale at present, on the onerous terms of a sheriff's sale, would seriously affect the price which the property would fetch; and that liquidation would be much more favourable to the interests of the general body of creditors.

Hopley, in support of the application:—The Court will look to the general interests of the creditors and not go out of its way to benefit one. The judgment creditor is secured and liquidation cannot damage him. The sheriff must advertise the property for six weeks, and the liquidator in about two months, with the easier terms he will be able to offer, will obtain a price which will pay off the preferent

creditor and leave a surplus for the other creditors, whereas the proceeds of a sheriff's sale will barely pay the judgment creditor and the expenses.

Levey was not called upon.

1883.
Dec. 10.
" 20.
—
Re Kimberley
Share Exchange
Co.

LAURENCE, J.:—The applicant is entitled to the order placing the company in liquidation, but the property attached must not vest in the liquidator. The only consideration which would induce me in the circumstances of the case to allow the property attached to vest in the liquidator would be clear proof that the secured judgment creditor would not be prejudiced thereby in availing himself of the remedy to which he is entitled. Here the evidence is rather the other way. It is admitted that he would be delayed in obtaining payment of his debt; and it is merely suggested that from a sale on terms, practically involving further delay, there might possibly result some surplus, out of the specially mortgaged property, for the concurrent creditors.

A winding-up order was accordingly made and Mr. G. Richards was appointed liquidator provisionally, with powers under sub-section 2 of section 15 of Act 12, 1868; advertisements to be forthwith inserted in the *Government Gazette*, the local *Gazette*, and one Port Elizabeth paper, that, unless good cause was shewn to the contrary on or before January 25th, 1884, Mr. Richards would then be appointed official liquidator: the property now under attachment not to vest in the liquidator, but the surplus, if any, after satisfying the judgment creditor to be paid over by the Deputy Sheriff to the liquidator. The costs of the opposing creditor to be costs in the liquidation.

[Applicants' Attorneys, GRAHAM & GILBERT.
Attorneys for the Judgment Creditor, STOW & CALDECOTT.]

CORNWALL, N.O., AND OTHERS *vs.* DREYFUS AND COMPANY.

Sheriff's sale.—Irregularities by Deputy Sheriff.—Conditions of sale and valuation of property attached.—Rules of Court 105–113.—Costs.

Where the Deputy Sheriff, after obtaining a valuation on oath of property attached, with a view to an execution sale, subsequently, without consulting the parties interested in the sale of the property, obtained other informal opinions as to its value, in consequence of which he lowered his reserve and sold the property for little more than one-third of the amount of the sworn valuation; and where he also at the time of the sale added certain verbal conditions varying from those contained in the published advertisement; the Court refused to confirm the sale and ordered the Deputy Sheriff to pay the costs of the application.

1883.
Dec. 10.
—
Cornwall *vs.*
Dreyfus & Co.

Dewhurst and Sim had in September, 1883, attached certain immovable property belonging to one Rintel, in satisfaction of judgments obtained by them. At a meeting on September 26th, at which were present the Deputy Sheriff, Dewhurst, Sim, and the representative of Dreyfus and Company, who held a general bond from Rintel for £30,000, an appraisement of the property on oath, valuing it at £1750, was exhibited. It was proposed by Dewhurst, and seconded by Sim, that the property be sold for cash on the spot; Dreyfus and Company protested. The Deputy Sheriff, however, caused the property to be advertised for such sale. One of the conditions was as follows:—"The purchase money to be paid in cash on the day of sale to the Deputy Sheriff." After a postponement of the sale caused by a rule *nisi* obtained by Dreyfus and Company, the property was finally advertised on December 3rd, and sold on December 5th (see *Dreyfus and Company vs. Cornwall, N.O.*, reported *supra*, p. 149). The Deputy Sheriff now applied to the Court to confirm the sale.

Hoskyns, C.P., for the Deputy Sheriff and Sim, and *Levey*, for Dewhurst, supported the application.

Forster, for Dreyfus and Company, opposed.

From the affidavits it appeared that, after the meeting of September 26th, the Sheriff had made further inquiries from the sworn appraiser who had valued at £1750 and from another sworn appraiser in the town. They had informed him—one by a private note, and the other by word of mouth—that in the present circumstances of the place as regarded value of property, and in view of the stringent terms of a Sheriff's sale, they would not expect the property to realise more than £600 or £700. Neither of these valuations was on oath and neither was exhibited to the objecting creditors formally at a meeting, or otherwise. The Sheriff, however, having satisfied himself as to the value, fixed the reserve price at £600. On the day of the sale the Sheriff, when reading the conditions of sale, added to the condition quoted above the following words:—"That means half an hour after it is knocked down; failing which it will immediately be put up again." The property was sold for £666 2s. 6d. Dreyfus and Company were represented at the sale, and, both verbally and by letter, protested against the course the Sheriff had adopted throughout.

Counsel having been heard on these facts:

BUCHANAN, J.P., said :—I am of opinion that this sale must be disallowed. It is the duty of the Sheriff to carefully follow and observe the rules which regulate the sale of property attached in execution of the judgments of the Court, and in the present case there are several important particulars in which these rules have not been complied with. The 105th Rule of Court requires the Sheriff, on attaching immovable property, to "inquire of and ascertain the extent and particulars of all bonds, hypothecations, and mortgages on and affecting the same, and call upon all parties interested in the said property to meet at his office, to consider of the expediency of selling the same, and to propose the conditions of sale." Dreyfus and Company were the holders of a mortgage bond, and as such were parties interested in the property. The Sheriff therefore, under Rules 105–107, properly invited them to be present at the meeting to consider the advisability of selling the property; and they acted properly and within their

1883.
Dec. 10.
—
Cornwall vs.
Dreyfus & Co.

1883.
Dec. 10.
—
Cornwall vs.
Dreyfus & Co.

rights in attending the meeting, and endeavouring, under the 108th Rule, to influence the time, mode and other conditions of the sale. The Deputy Sheriff has also fulfilled up to a certain point the requirements of Rules 109–111; under Rule 110 he obtained a valuation on oath of £1750 for his guidance, and this is the basis on which the bond creditors thought he was proceeding; in fact from the Deputy Sheriff's account it appears that he now charges a commission of one per cent. on this very sum. Any interested party who is dissatisfied with the valuation obtained by the Deputy Sheriff may, under Rule 110, supply the Sheriff with a valuation made in like manner by any indifferent person. It does not appear however that any of the parties interested expressed or felt any dissatisfaction with the valuation of £1750 obtained by the Deputy Sheriff. Then it seems that the valuator materially reduced his valuation, but by an informal letter to the Deputy Sheriff and not on oath, and the Deputy Sheriff obtained an informal opinion from another valuator also not on oath. This new basis upon which he formed his judgment was obtained behind the back of the bond creditors, and never submitted to them, and thus they had no opportunity of getting an independent valuation or of appealing, as provided by Rule 111, against the valuation obtained by the Sheriff. Now if these rules could be departed from at all, the provisions of Rule 113, as to the Sheriff at or before the sale fixing a secret reserve price, might also possibly be construed with laxity, so long as the Sheriff's conduct was *bona fide*, and no prejudice was directly shewn to have resulted therefrom; but if once there is a departure from the rules laid down it is impossible to say where it will stop, and it would be opening the way to inquiries which it would be found very difficult to prosecute. The secrecy which the 113th Rule requires would be done away with if the Deputy Sheriff were to be allowed to consult people, however competent they may be, informally as to the value of the property attached. Further, we have a variation from the published advertisement, and it appears that verbal conditions as to payment of the purchase money within half an hour, &c., were fixed by the Deputy Sheriff at the time of sale which were not in accordance with the conditions of the

deferred sale, as published in the local *Gazette*. This was another irregularity, and it is impossible to say that it may not have materially affected the price obtained. The decisions on these Rules of Court and the manner of their observance are very few, but the rules themselves are few and simple, and it has always been thought necessary to construe them with rigidity. In the present case there has been a material departure from them in several important respects, and it is therefore impossible for the Court to confirm the sale. Though I do not at all doubt that the conduct of the Deputy Sheriff has been perfectly *bona fide*, still it has been clearly erroneous, and he must therefore pay the costs of this application.

1883.
Dec. 10.
—
Cornwall vs.
Dreyfus & Co.

LAURENCE, J., concurred.

[Applicants' Attorneys, HAARHOFF BROTHERS.]
[Respondents' Attorneys, STOW & CALDECOTT.]

In re STANDARD DIAMOND MINING COMPANY, LIMITED.

Winding-up order.—Act 12, 1868, sections 2–4.

An application for a winding-up order, under section 3, sub-section 1, of Act 12 of 1868, refused, on the ground that the petition did not state that the alleged judgment debt remained unsecured as well as unpaid, or that it had remained unsatisfied without the consent of the judgment creditor.

A subsequent petition presented by the holder of fully paid-up shares refused, on the ground that, as he alleged the inability of the Company to pay its debts, he had no interest in the matter, there being no probability of a surplus in the liquidation available for distribution among the shareholders.

This was an application for the winding up of the Standard Diamond Mining Company, Dutoitspan Mine, on the petition of David Harris, a shareholder in the Company.

1883
Nov. 29.
Dec. 20.
—
In re Standard
Diamond Mining
Co. Limited.

1883.
Nov. 29.
Dec. 20.

In re Standard
Diamond Mining
Co., Limited.

Hoskyns, C.P., read the petition, which alleged that a certain judgment debt owing by the Company to the Bank of Africa had remained “unpaid and unsatisfied for thirty days without the consent of the petitioner.”

LAURENCE, J., pointed out that this did not amount to proof of the inability of the Company to pay its debts under sub-section 1 of section 3 of Act 12, 1868; it was necessary to allege that it was “without the consent of the creditor” that the judgment remained unsatisfied.

Forster, for the Bank of Africa, said that he was about to take this objection and also that the petition merely alleged that the debt was “unpaid and unsatisfied” and not, as the section required, that it was “unpaid and unsecured.”

The petition was dismissed with costs.

Postea (Dec. 20), *coram* LAURENCE, J.:—

A petition for the winding up of the same Company was presented by Henry Cohen, who stated that he held 4230 shares out of 16,500 which formed the capital of the Company; he alleged that the Company was unable to pay its debts, the Bank of Africa having obtained judgment against it, on July 31st, 1882, and November 20th, 1883, for the respective sums of £9361 and £3000, with interest and costs, which judgments still remained unpaid without the consent of the said Bank for the period of thirty days, the Bank having issued writs thereon and attached the movable property of the Company. He added that three-fourths of the subscribed capital of the Company had been lost or expended, and that there was no available capital for the future working of the Company, which was entirely without funds and unable to carry on its business. The application was opposed by the Bank of Africa, and the local manager of the Bank filed an affidavit stating that the capital of the Company at the date of its formation, in claims, machinery and reserve for working expenses, which latter item amounted to £4250, amounted to £65,000, and that the claims and machinery, together with improvements and additions to the latter, had not been lost

or become unavailable, though they had been attached by the Bank as judgment creditors, to whose interests a winding-up order would be detrimental.

1883.
Nov. 29.
Dec. 20.

*In re Standard
Diamond Mining
Co., Limited.*

Hoskyns, C.P., in support of the petition, said the Bank was the principal creditor and it was really dissipating the property of the Company. He referred to *Buckley on Companies*, 4th ed. 199, to shew that a holder of fully paid-up shares was a "contributory" within the meaning of the Act and could present a petition for a winding-up order. If the Court thought that, in face of the opposition of the Bank, no case had been made out under sub-section 1 of section 3, he would rely on sub-sections 4 and 6 of section 2. The case was clearly one in which it was just and equitable that the Company should be wound up.

Levey, for the opposing creditor, was not called upon.

LAURENCE, J.:—I am of opinion that this application must be refused. The *Crown Prosecutor*, in the exercise of his discretion, has felt unable to press the application on the ground of any proved inability on the part of the Company to pay its debts; but that is the ground on which the petition has been based, and the petitioner must rely on the allegations to which he has sworn. Moreover, if there were no other objection to entertaining this petition, it seems clearly to be defective through not *alleging* any interest on the part of the petitioner in its prayer being granted. However, I prefer to base my decision on a very simple ground. Although it is true that the holder of fully paid-up shares is a "member or contributory," and therefore can petition under section 4, it is clear that his petition cannot be entertained if he not only fails to allege an interest, but if he makes allegations, as the present petitioner has done, which actually disprove the possibility of his possessing one. The petitioner alleges that the Company is unable to pay its debts, that it is entirely without funds, and totally unable to carry on its business; it is clear, therefore, on his own shewing, that if the order were made and the Company wound up there are no reasonable grounds for the expectation that there would be any surplus available for distribu-

1883.
Nov. 29.
Dec. 20.

*In re Standard
Diamond Mining
Co., Limited.*

tion among the shareholders, of whom he is the principal. *Buckley* says that the holder of fully paid-up shares "must shew sufficient grounds for a winding up, for he cannot be called upon to contribute anything, and his interest is only this, that if there be a surplus of assets he is entitled to be repaid a portion of such surplus. And if he be the sole petitioner, and the creditors do not press for payment, and the Company has not had a fair trial, the order will be refused. If the Company's assets are insufficient for payment of its debts a paid-up shareholder has no interest whatever in the matter. If he presents a petition he must allege and prove, at least to the extent of a *prima facie* case, that there are assets of the Company of such an amount as that in the winding up there will be such a surplus as to give him a tangible interest;" *Buckley on Companies*, 199; *re Diamond Fuel Co.*, 13 Ch. D. 400, 411; *re Rica Gold-Washing Co.*, 11 Ch. D. 31, *per Jessel*, M. R. at p. 43. The present case appears to fall within these authorities, and the petition must therefore be dismissed, with costs.

[Attorneys for the Petitioner, CORYDON & CALDECOTT.]
[Attorneys for Opposing Creditor, STOW & CALDECOTT.]

ADAMANTA DIAMOND MINING COMPANY, LIMITED,
vs. WEGE.

*Joint-stock Company.—Contract to take shares.—Prospectus.
—Misrepresentations by Secretary.—Payment of appli-
cation money.—Lapse of time and acquiescence.*

In an action by a Company on a contract to take shares, the defendant pleaded misrepresentations in the prospectus and verbal misrepresentations by the secretary of the Company. Held, on the facts, that no such misrepresentations had been proved as would entitle the defendant to be relieved from his contract.

The prospectus having stated that all applications for shares must be accompanied by the first instalment of the purchase money, and it having been proved that in some instances

applications had been received and shares allotted without such payment:—Held, that this was not such a misrepresentation as to entitle a shareholder, who had duly paid his application money, to the rescission of his contract.

The application money having been paid by a cheque drawn in the defendant's favour, and endorsed by him, and which there were funds to meet both on the date of payment and for some time afterwards, but which was ultimately dishonoured owing to the failure of the plaintiffs to present it timeously:—Held, that the defendant could not be compelled to make good the loss of this amount, which was occasioned by the negligence of the plaintiffs.

The alleged misrepresentations on which the defendant relied having been brought to his notice shortly after the contract to take shares was made, and he having taken no steps in the matter till two years afterwards, when he had been sued on the contract. Semble, that even if the misrepresentations had originally furnished a good ground of defence, the defendant would have been estopped from raising it by the presumption of acquiescence arising from lapse of time.

This was an action in which the plaintiff Company sued the defendant, a farmer in the district of Kimberley, for the amount due on certain 100 shares allotted to him on the formation of the Company in March, 1880. The shares were of £10 each, and the claim was for £1000, with interest on the various instalments from the times at which they ought to have been paid.

The defendant's plea admitted that he had applied for 100 shares but denied that they had been duly allotted to him. It set forth that the application for the 100 shares was made subject to the condition that the Company would take a certain cheque for £200 made by one Osterloh in favour of the defendant, and endorsed by the defendant, as full payment of the £200 due on application according to the terms of the prospectus, but that the plaintiffs afterwards refused to do so, and therefore the defendant gave them notice that he would not accept the allotment of the shares.

1883.
Dec. 4.
" 5.

Adamanta
Diamond Mining
Co. vs. Wege.

1883.
Dec. 4.
" 5.
Adamanta
Diamond Mining
Co. vs. Wege.

The defendant further pleaded that he was induced to apply for the shares by certain statements in the prospectus of the Company, which was annexed to the plea, and on which he relied, *inter alia* that the claims therein mentioned had been sold into the Company; that shares would not be allotted unless the first instalment was paid on application; that stones of extraordinary size had been found in the claims; that the greater portion of the ground had been worked into the "blue," and that the rest of the claims were entirely free from reef and debris; which representations were false, misleading and untrue.

At the trial *Davison*, for the defendant, asked leave to add a plea that the defendant was deceived by false and misleading statements made verbally by Richter, the secretary of the Company. The plea set forth the same misrepresentations as were alleged to be contained in the prospectus, whereby the defendant said he had been induced to apply for the shares, &c.

Hoskyns, C.P., did not oppose this amendment, but gave notice that if it became necessary he would ask leave to raise the question of acquiescence upon the pleadings.

There was also a claim in reconvention for the sum of £200 which the defendant claimed as damages by reason of the plaintiffs having neglected to make a timeous presentment of Osterloh's cheque for £200, which, upon presentment long after its date, was dishonoured, whereas when it was given to the plaintiffs Osterloh had ample funds in the bank, and it would have been honoured; whereby the defendant maintained that he had suffered damage to the extent of £200.

The plaintiffs joined issue on the plea; and as to the claim in reconvention pleaded that, if the facts were as alleged, the amount of Osterloh's cheque was a payment made to them for the first instalment due from the defendant on his contract, and that, if there were a loss through their neglect to present it while there were funds to meet it, the defendant had no claim on the plaintiffs by reason of such loss.

The plaintiffs proved the application by the defendant for 100 shares at £10 each, payable as follows:—£2 on application, £3 on allotment, £2 two months after allotment, and £3 three months after allotment; that the application was made on March 30th, 1880, and that the full number of shares were allotted to the defendant on April 2nd, 1880; that notice of such allotment was posted to the defendant by registered letter a few days after, and that the allotment paper had been seen in his possession shortly after it was so posted. This closed the plaintiffs' case, subject to the right to call evidence, if necessary, in rebuttal of the plea of misrepresentation.

Evidence was then called for the defence, to shew that the defendant, being a great friend of Richter, the secretary (as well as a director and promoter) of the plaintiff Company at the time of its formation, and who was now deceased, was persuaded by him to apply for 100 shares. The defendant did not see the prospectus of the Company, but Richter made verbally all the statements contained in the prospectus which were those pleaded as misrepresentations, and added recommendations of his own such as:—"You may safely invest in this Company, as the ground is good and in the best part of Dutoitspan mine and there is sure to be a good dividend." The defendant, not having the money with him at the time, which the prospectus required to be paid on application being made for shares, a friend of his, Osterloh, who was present, gave his cheque for £200 to the defendant, which cheque he endorsed and sent with his application. Osterloh had then ample funds in the bank and the defendant later in the same day paid him £200 for the cheque. Defendant then went home and received the letter informing him that 100 shares had been allotted to him. More than a month later he received a letter calling on him for payment of £500, the amount of the first two instalments. He then went to Kimberley and asked about the cheque. Richter thereupon produced it and sent it to the bank for payment, but it was returned dishonoured for want of funds to the credit of the maker. Thereupon Richter said, "Well, pay the instalment and we shall say nothing about the

1883.
Dec. 4.
" 5.
Adamanta
Diamond Mining
Co. vs. Wege.

1883.
Dec. 4.
" 5.

Adamanta
Diamond Mining
Co. vs. Wege.

"cheque;" the defendant replied, "No, if you do not get "this money I will not pay another farthing." He thereupon left the Company's office and had ignored the Company ever since, but had taken no active steps to have the contract rescinded. In August, 1882, he had received a letter of demand for £1000 for the four instalments overdue, but had made no reply to it. In cross-examination the defendant admitted that he had been a digger for a good many years before he began farming, and that he had done a good deal in share speculations. Evidence was led to shew that the statements in the prospectus, and those made by Richter, were false and misleading; but the Court was not satisfied that any misrepresentation was proved. The effect of the evidence upon this point will more fully appear from the judgments given below. It was also proved that in some instances shares had been allotted without payment of the instalment due on application.

Hoskyns, C.P. (with him *Hopley*), for the plaintiffs, who was called upon only as to the claim for £200, for which the cheque had been paid, admitted that there had been *laches* on the part of the plaintiffs in not presenting the cheque which they received as payment of the first instalment and that consequently the loss, if they could get nothing from Osterloh, must fall on the Company. If the defendant had tendered £800 with interest it would have been accepted.

Davison (with him *Levey*), for the defendant, argued upon the evidence that misrepresentations of material facts with regard to the state of the ground and machinery had been proved; he referred to *Ross vs. Estates Investment Company*, L.R. 3 Eq. 122; *Buckley on Companies*, 52. He contended that allotting the shares to various applicants without first getting the instalment due on application was a breach of faith with the other applicants, and as it affected the amount of capital which applicants had a right to calculate and expect would have to be subscribed before the Company commenced business, it amounted to a misrepresentation entitling an allottee to a rescission of the contract; *Buckley on Companies*, 4th Edition, 19, 99. Moreover the treatment of the cheque by the Company shewed that there was not that *consensus* necessary to a binding contract. The defendant

at the time thought he had 100 shares with £200 paid up, but the plaintiffs said he had 100 shares with nothing paid up.

BUCHANAN, J.P.:—The law as to misrepresentation and fraud in the case of contracts to take shares in companies has been so fully argued in this Court, and so clearly laid down from the Bench in the case of *Atlas Diamond Mining Company* vs. *Poole* (Reports, vol. i. part 1, p. 20) and in the more recent case of *Adamanta Diamond Mining Company* vs. *Smythe* (*ib.* part 3, p. 406) that I must say that, after those decisions, I do not think the present case, if the defendant had been well advised, would have been brought into Court. Those cases really ought to have settled the present question. In the latter case, in which the present Company were also plaintiffs, misrepresentations almost exactly the same as those now set up on behalf of the defendant, were set up on behalf of *Smythe*; and although the plaintiff Company failed on another ground in that case, not having been able to prove the allotment which constituted the contract, still the question of misrepresentation was fully gone into, and the Court was unanimously of opinion that the defendant's proof on that part of the case had entirely failed. Here, as then, what the defendant really relies on are not the statements published in the prospectus but the alleged verbal misrepresentations of the Company's late secretary, Richter. Mr. Richter being dead, it is necessary to scan and weigh evidence as to statements made by him with special care and caution; but I am clearly of opinion that, supposing the defendant's account of what Richter said to him to be perfectly correct, he has failed to prove that those statements, though they may perhaps fairly be described as highly coloured, were such misrepresentations as would justify him in claiming to be relieved from his contract. The evidence in fact appears to shew that Richter's representations, so far as they related to matters of fact and not merely of opinion, were, or at all events may well have been, substantially correct. I mean as to the value of the ground, the extent to which it had been worked, the condition of the machinery, &c. Then again it is contended, as a second ground of defence, that, even if

1883.
Dec. 4.
„ 5.

Adamanta
Diamond Mining
Co. vs. Wege.

1883.
Dec. 4.
„ 5.

Adamanta
Diamond Mining
Co. vs. Wege.

there were a valid contract *ab initio*, by which the defendant was bound, yet he was subsequently relieved from it, in consequence of the failure of the plaintiffs to obtain payment of the cheque which the defendant had given for the application money. It is alleged that in consequence of this hitch it was understood between the defendant and Richter that the contract was “off”; but even if Richter had power to make any such arrangement on behalf of the Company, it rather seems, from the defendant’s evidence as to the conversation on this subject, that the matter of his liability in respect to the application money was left in abeyance for future decision. There was certainly no clear agreement, no *consensus ad idem*, at this time that the defendant should be relieved from any further liability on his shares, and the contract having once been made, it would be necessary to furnish clear proof of such *consensus* before it could be held to have been subsequently terminated. As to the £200 for application money, which was paid in the form of a cheque to the defendant’s order and endorsed by him, the plaintiffs accepted payment in this form, and if they had presented the cheque in due course it is proved that it would have been honoured, and for all we know it may be honoured still. If, however, the amount is lost, the Company, under the circumstances, are clearly liable for the loss, and the defendant cannot be compelled to pay this sum over again. The plaintiffs are entitled to judgment for the balance due on the shares, namely the sum of £800, with interest from the dates at which the various instalments fell due, and costs; and they must also have judgment on the claim in reconvention. It is no doubt much to be regretted that Mr. Wege, like many others, was led away by the excitement of the time to risk his money in speculations which have in many cases turned out to be unsuccessful; but this was a risk which he chose to run, and, as was observed by the Court in the *Atlas* case, it is impossible for the Court to allow shareholders who have made an unfortunate investment to turn round and repudiate their liability, after months and years have elapsed, just because things have not turned out in the way they anticipated. Shareholders, like other people, are expected to use ordinary caution in their

business dealings; and if they do not, and suffer in consequence, they have only themselves to blame for the result.

1883.
Dec. 4.
„ 5.

Adamanta
Diamond Mining
Co. vs. Wege.

LAURENCE, J.:—I concur in the Judge President's expression of regret that in this case it is impossible for the Court, on the facts proved, to relieve the defendant from the liabilities arising out of his contract with the plaintiff Company. There can be little doubt, I think, from the facts disclosed in this and in another case in which the same Company brought a similar action, that the late Mr. Richter, who was at once a vendor, promoter, director and secretary, did make certain representations as to the prospects of the Company which influenced many persons, including the present defendant, in applying for shares, and that those representations—whether owing to the failure of subscribers to pay their calls and thus supply the necessary working capital, or for other reasons—have up to the present time remained unfulfilled. It is also possible that Mr. Wege, living as he did in the country and only occasionally visiting Kimberley, regarded these shares as a genuine investment, and did not apply for them merely for speculative purposes; though, if this were so, it is certainly surprising that he made no independent inquiries as to the nature and value of the property; and certainly the evidence of Vermaak would lead one to suppose that the defendant was mainly influenced by what the other witnesses who were examined candidly admitted was the object which led them to apply for these shares, namely the hope of making a profit on their allotments by selling them at a premium. The defendant's pleading in this case, I cannot but observe, is singularly imperfect; for, although he defends the claim for overdue calls and seeks to repudiate his liability on the ground of misrepresentation, he makes no claim in reconvention for the rescission of his contract or for the removal of his name from the register of shareholders. For the defence to succeed, the defendant must shew firstly that misrepresentations of such a nature as to render voidable a contract induced thereby were made by the plaintiff Company, or its authorised representative; secondly, that in point of fact he was induced by those misrepresentations to enter into the contract; thirdly, that

1883.
Dec. 4.
" 5.

Adamanta
Diamond Mining
Co. vs. Wege.

there has been no subsequent *laches* or acquiescence on his part disentitling him to relief. Now the defendant has not satisfied me on any of these points. As to the first, he states that, as far as he can remember, he never saw the Company's prospectus and was influenced solely by the verbal representations made by Richter; it is therefore unnecessary to consider the statements put forth in the prospectus, which was not before the defendant at the time of the contract. The statements made by Richter no doubt depicted the prospects of the Company, as is usual in such cases, in a sort of hue of *couleur de rose*; but I cannot say that any positive misrepresentation has been proved. According to the defendant, Richter stated that most of the Company's claims were in the blue ground; according to Phillips, who was called for the defence, some nine out of fifteen claims were actually in the blue. Richter further stated that the Company's machinery was such that operations could be commenced within a few days; and the witnesses for the defence prove that this was the case, and that operations did so commence, and although the machinery was perhaps inadequate, and the amount of hauling and washing which could be performed with the engines then on the ground was too small to give much hope of the operations of the Company proving profitable, yet it is to be observed that the prospectus itself only estimates a probable average of 200 loads a day, and this estimate seems to have been in substantial accordance with the capabilities of the machinery, as stated by the witnesses called for the defendant. Again Richter, as is stated, shewed the defendant some diamonds which he alleged had been found in the claims in question; some of those claims had been recently worked, and there is nothing to shew that the stones had not been found as described. Lastly, Richter expressed an opinion that the Company would pay "a good dividend"; but this was a mere expression of opinion, the realisation of which may have been hindered, as in many other similar cases, by circumstances which could not then have been anticipated. On these grounds, I think the defendant has failed to prove any such misrepresentation as would entitle him to claim relief from the Court. Even supposing there were such misrepresentation, I have already

mentioned the reasons which make me think it very doubtful whether the defendant was really misled by it, or acted on it, or was induced by it to make the contract. That there was a completed contract when the defendant received his allotment in terms of his application, and that the validity of this contract was in no way affected by the fact that other applications were received and accepted without the accompanying deposit required by the prospectus, seems to me too clear for argument. Neither was the defendant's contract in any way affected by the difficulty which subsequently arose owing to the cheque drawn by Osterloh, which he gave for the application money, being dishonoured on presentation. There having once been a *consensus ad idem* to make the contract, a similar *consensus* was necessary to rescind it; and this has not been proved. In fact, when Richter spoke to the defendant about the dishonoured cheque he seems to have stated that, if the allotment money were paid, he would not trouble the defendant further about the application money represented by the cheque in question. This sum, in fact, it seems clearly proved was lost through the plaintiff Company's negligence in not presenting the cheque in due time, when there were funds to meet it. They still hold the cheque and may still be able to obtain payment of the amount; and I concur in thinking that this sum of £200 having been once paid by the defendant, and lost by the plaintiffs, there is no ground whatever for the claim which has been made against the defendant to pay it again. The last point which I have to mention, and which it appears to me is in itself sufficient to decide the case, is this. These alleged misrepresentations were made some two years and a half ago. Their existence has not been only recently discovered by the defendant. On the contrary he says that shortly after his application for shares, he discovered that the Company was "bad." It then became his duty, if he wished to protect himself, to take prompt and clear steps to repudiate his contract. It is said that he made a verbal repudiation to Richter, but there is nothing to show that Richter acquiesced in this repudiation. In *Pollock's work on Contracts*, where this subject is very carefully discussed, it is stated (2nd edition, p. 509): "In the case of shares in a Company a

1883.
Dec. 4.
.. 5.

Adamanta
Diamond Mining
Co. vs. Wege.

1883.
Dec. 4.
„ 5.

Adamanta
Diamond Mining
Co. vs. Wege.

repudiation expressed by word of mouth to the secretary at the Company's office will do." The authority cited for this proposition is *McNiell's Case*, L. R. 10 Eq. 504, a decision of Lord ROMILLY, M. R. On looking at the facts of that case it will however be seen that they are of a very different nature to those now before us. It seems that McNiell, on the discovery of certain fraudulent misrepresentations in the prospectus, on the faith of which he had taken his shares, "repudiated the shares both privately, in an interview with the secretary, and publicly, at a meeting of shareholders. Other shareholders also repudiated their shares, and instituted proceedings for the purpose of having their names removed from the register, while the Company commenced actions against them for the recovery of unpaid calls; but McNiell took no steps whatever, nor were any steps taken against him. After the public meeting, he received two circulars issued by the directors of the Company, one of which stated that, at the request of the dissentient shareholders, they had consented to stay legal proceedings for a time, with a view, if possible, of amicably settling their differences, and that they would, as soon as possible, communicate the result to the shareholders; and the other stated that the directors intended to appeal against a decision in a suit instituted by one of the shareholders for the purpose of being relieved from his shares." Thus it seems that McNiell's repudiation was known to his fellow-shareholders and to the directors, and conditionally acquiesced in by the latter, features to which there is nothing corresponding in the present case. *Vigilantibus non dormientibus æquitas subvenit*; there McNiell was *vigilans*; here Wege is *dormiens*. In the present case, after the alleged repudiation to the secretary, the Company sent Wege a circular, in a registered letter, in May, 1882, addressed to him on the footing of his being a shareholder; and he took no step to disavow his liability as such. In August, 1882, he received a letter from the Company's attorney, on the same basis; and he made no protest, but remained passive. It was not till twelve months afterwards, in August, 1883, when he was summoned in this action, that he repudiated his contract on grounds which, if they could ever have been regarded as valid, should have

been raised long previously. Professor Pollock thus lays down the rule, as to the right to rescind and estoppel by acquiescence, in the case of contracts by shareholders with Companies:—"The contract must be rescinded within a reasonable time, that is, before the lapse of a time, after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that the right of rescission is waived." The learned author proceeds to state, I think correctly, "It is believed that the statement of the rule in some such form as this will reconcile the substance and language of all the leading authorities" (*Pollock on Contracts*, p. 515). In the present case, I think Wege's conduct was such as to allow the plaintiff Company to fairly infer that the right of rescission, if it ever existed, was waived; and I therefore concur in thinking that the plaintiff Company must have judgment for the amount claimed, less the £200 which is proved to have been already paid, and, in the absence of any tender, with costs of suit.

1883.
Dec. 4.
" 5.
Adamanta
Diamond Mining
Co. vs. Wege.

Judgment accordingly for the plaintiff Company, for £800, together with interest on the last three instalments from the dates on which they ought, in terms of the prospectus, to have been paid, with costs: judgment also for the plaintiff as defendant in reconvention.

[Plaintiff's Attorney, RHODES.
Defendant's Attorney, COGHLAN.]

DEWHURST vs. MATHEW.

Attorney and Client.—Costs of suit.

An attorney, who has done the work for which he was engaged, may recover his fees directly from his client, notwithstanding that they were part of the costs in an action wherein the Court had ordered that the costs should be paid out of a certain fund.

The declaration set forth that in the month of July, 1883, the defendant had retained the plaintiff to institute certain

1883.
Dec. 5.
Dewhurst vs.
Mathew.

1883.
Dec. 5.
—
Dewhurst vs.
Mathew.

proceedings in obtaining the appointment of a liquidator in the partnership estate of "Mathew and Seavill," and that thereupon at the defendant's request the plaintiff did institute such proceedings, and did certain professional work and made certain disbursements; that the amount due to the plaintiff for such work and disbursements had been taxed at £60 11s. 9d., of which the sum of £50 11s. 9d., which the plaintiff now claimed, with interest and costs, still remained due and unpaid. The defendant admitted the facts set forth in the declaration, but pleaded that in appointing the liquidator in the original proceedings the Court had made order that the costs should be paid by and come out of the joint estate of Mathew and Seavill; that the sum now sued for was part of the costs so incurred and that the present liquidator (who had been appointed by consent of the partners, the one appointed by the Court having refused to act) had sufficient money belonging to the said joint estate in his possession to meet this claim of the plaintiff; wherefore the defendant says that the plaintiff ought not to have and maintain an action against him personally, &c. The plaintiff's replication submitted that the order of Court was binding merely on the parties before the Court, and did not affect the plaintiff in respect of his costs as the attorney retained by the defendant; and further that by the private appointment of a liquidator by the defendant and his partner the defendant dispensed with the services of the plaintiff, which had been completed on the appointment of the liquidator by the Court. The rejoinder was general.

The facts as set forth in the pleadings were all admitted.

Hoskyns, C.P., for the plaintiff:—An attorney having done the work for which he was employed can come to his client for his costs and is not bound to look to the unsuccessful opponent or to any other source for payment. In this case all the work was done when the Court appointed a liquidator; and when the parties subsequently, by mutual arrangement and without the intervention of the plaintiff, appointed their own liquidator, the defendant dispensed with the plaintiff's services and terminated the retainer. The costs are given to the party and not to the attorney. The defendant might

get them from the liquidator but the plaintiff looks only to the defendant; *Municipality of Oudtshoorn vs. Du Preez*, 1 Juta, 195.

1883.
Dec. 5.
—
Dewhurst vs.
Mathew.

Hopley, contra :—These costs were all incurred in procuring the liquidation order for the firm, and that order distinctly said that the costs were to come out of the partnership estate. The defendant had never denied the amount or fairness of the charges, but had merely asked the plaintiff to comply with the order and not to come to him personally for the money. The present liquidator had sufficient funds in hand to pay the plaintiff's claim and was quite willing to do so. It was for the Court to construe its own order and to say whether the plaintiff could, after that order, maintain an action against the defendant personally for this sum or whether he ought not first to try to get it from the liquidator. He referred to *Fisher's Digest*, col. 1132; *Leake on Contracts*, 127, *sub fine*.

THE COURT held that the costs to be paid out of the estate had been awarded to the defendant and not to the plaintiff, and that under that order the defendant could obtain the amount from the liquidator who had been subsequently appointed by mutual arrangement; but that, the plaintiff having exhausted his mandate, and his authority in the matter having been tacitly revoked, it was no longer competent for him, as the representative of his client, to obtain costs from the liquidator, but he was entitled to payment from his client personally. Judgment would therefore be entered for the plaintiff for the amount claimed.

Hopley asked that, as this was a claim on a taxed bill of costs, the costs of a summons for provisional sentence only should be given; but

THE COURT held that the plaintiff was under no obligation to sue provisionally, and awarded him the costs of the action.

[Plaintiff in person.
[Defendant's Attorneys, GRAHAM & GILBERT.]]

MAGISTRATES' CASES REVIEWED.

 QUEEN vs. JOHN WILLIAMS.

Proof of previous convictions.—Act 17, 1874, sect. 6, and Act 21, 1876, sect. 5.

The proof of previous convictions before judgment, though a serious irregularity, does not necessarily involve the quashing of the conviction.

The attention of Magistrates directed to the necessity of all sentences of lashes being confirmed on review before being carried out.

1883.
Sept. 10.
—
Queen vs.
Williams

LAURENCE, J.:—This case comes in review from the Assistant Resident Magistrate of Hay. The prisoner, a native servant, was charged with stealing a glass of sherry, and was sentenced to three months imprisonment with hard labour. There were two previous convictions proved, and in all the circumstances of the case I do not think the sentence was excessive. The Magistrate, however, committed a serious irregularity in receiving proof of the previous convictions before giving judgment in the case before him. As, however, there was sufficient proof of the commission of the offence, and there is no reason to suppose that the judgment of the Magistrate was affected by the proof of the previous convictions, I do not think that I should be justified in refusing to certify real and substantial justice on account of this irregularity. Another point in the case which deserves attention is that, on looking at the proof of the previous convictions, I noticed that while one of them, where the sentence

was imprisonment, had been duly confirmed, in the other case, where a sentence of twelve lashes had been imposed, there had apparently been no confirmation. I accordingly directed the Registrar to write to the Magistrate on this point and his reply was that, as the sentence did not exceed twelve lashes, no review or confirmation was necessary. I have reason to believe that this is not the only case of ignorance on the part of Magistrates of the necessity under Act 17 of 1874, sect. 6, as amended by Act 21, 1876, sect. 5, of all sentences of lashes being confirmed on review before they are carried out. I would suggest that when the Magistrates send in their monthly returns to the Crown Prosecutor under section 46 of Act 20 of 1856, the point might be borne in mind, and inquiry made, if in any case it appeared that such sentences had been passed and not confirmed on review.

1883.
Sept. 10.
—
Queen vs.
Williams.

Hoskyns, C.P., said the matter should not be lost sight of.

QUEEN vs. JACK.

Ordinance No. 72, sect. 29.—Effect of plea of guilty.

Where a prisoner pleads guilty, and the Magistrate has before him a statement on oath disclosing the commission of the crime alleged, it is nevertheless desirable for some evidence to be taken in the prisoner's presence in support of the charge.

LAURENCE, J.:—The prisoner in this case was charged before the Resident Magistrate at Dutoitspan with the crime of contravening section 57 of Ordinance 16 of 1879. He pleaded guilty, and was thereupon sentenced to two months imprisonment with hard labour. The Magistrate appears to have thought it unnecessary to take any evidence, having before him an affidavit sworn before himself, and disclosing the commission of the offence by

1883.
Sept. 10.
—
Queen vs. Jack.

1883.
Sept. 10.
Queen vs. Jack.

the prisoner. The principal reported cases in which the question has been discussed whether, bearing in mind the provisions of section 29 of Ordinance 72, a Magistrate is justified in convicting a prisoner on his plea alone, are a case reviewed by BELL, J., and reported in Buch. 1868, 140, and the case of *R. vs. Strydom*, in which the judgment of DE VILLIERS, C.J., after the matter had been argued at the bar, will be found reported in 1 Juta, 61. In neither of these cases is it clearly laid down that a Magistrate, who has a statement on oath before him disclosing the commission of the crime, is not justified in convicting on a plea of guilty without taking further evidence; in fact in the latter case the Chief Justice intimated that he had felt justified in such circumstances in certifying that the proceedings were in accordance with real and substantial justice. I think, however, it is clearly desirable as a general rule for the Magistrate to take some evidence in open Court and in the presence of the prisoner. It may often happen that a native prisoner pleads guilty to the commission of some statutory offence without fully comprehending the exact nature of the charge against him; and in the Special Court cases have come before me in which such prisoners have pleaded guilty to a contravention of the Diamond Trade Act, but where the evidence has satisfied the Court that they were really innocent; and in such cases they have been allowed to withdraw their plea, and have been acquitted. Moreover, where a prisoner is really guilty, he may sometimes put questions in cross-examination in mitigation of sentence, which will materially affect the judgment pronounced. In the present case, I thought it advisable to remit the record to the Magistrate, with a direction to take some evidence in the prisoner's presence in support of the charge; and this having been done, I then felt no difficulty in confirming the proceedings.

QUEEN *vs.* BROWN.

Act 27, 1882, sections 5 and 9.—Ordinance 24, 1874, Griqualand West, section 4.—*Splitting charges.*

Where the accused has at the same time and place been guilty of swearing and shouting in a public place, and also of drunken and riotous behaviour, the charge should not be split up and separate offences laid, and cumulative sentences passed exceeding in the whole the jurisdiction of the Special Justice of the Peace before whom the accused was tried.

LAURENCE, J. :—In this case the prisoner was charged before the Special Justice of the Peace at Keiskamma with contravening section 5, clause 18 of Act 27, 1882, by swearing, shouting, &c., in a public place on August 23rd. He pleaded guilty, was convicted, and was sentenced to the *maximum* sentence which could be imposed, that is to pay a fine of £2 or in the alternative to be imprisoned for one month with hard labour. The sentence was somewhat severe, but I have felt no difficulty in certifying that the proceedings were in accordance with real and substantial justice. The prisoner however was further charged with contravening section 9 of the same Act by being drunk and riotous at the same time and place. On this charge he was also convicted, and was sentenced to pay a fine of £1 or in default of payment to be imprisoned with hard labour for fourteen days. These proceedings appear to involve two questions. In the first place, is it competent for a Special Justice of the Peace to split up what was really one continuous offence, namely the disorderly conduct of a drunken man, into two charges, under different sections of this Act, and under these separate charges to impose cumulative sentences, exceeding his *maximum* jurisdiction? Secondly, if these proceedings were technically competent, were they in accordance with real and substantial justice, or is not this rather a case in which the Court should exercise its power, under section 4 of Ordinance 24 of 1874, Griqualand West, of diminishing

1883.
Sept. 16.
Queen *vs.* Brown.

1883.
Sept. 10.
Queen vs. Brown.

the punishment awarded by the Special Justice of the Peace? I should be glad if the Crown Prosecutor would consider these points.

Postea (same day),—

Hoskyns, C.P., said that, at all events on the second ground, he was not prepared to support the second conviction.

The conviction was therefore quashed. (a)

QUEEN vs. VISSER AND KOK.

Act 17, 1867.—Evidence.

On a charge of stock-theft under Act 17 of 1867 a Magistrate cannot sentence to both imprisonment and lashes. Where a prisoner was charged under the Act, and was convicted of being an accessory and eating some of the stolen meat, and there was no evidence that he was an accessory or that he knew the meat to be stolen, the Court quashed the conviction.

1883.
Sept. 18.
Queen vs. Visser
and Kok.

LAURENCE, J.:—These prisoners were charged before the Assistant Magistrate of Hay with the crime of stock-theft, under Act 17 of 1867. They were both convicted and Visser (against whom a previous conviction, just within the last three years, was proved) was sentenced to be imprisoned with hard labour for twelve months, and to receive twenty-five lashes, while Kok was sentenced to twenty lashes. This is by no means the first time that it has been necessary to point out that under this Act Magistrates can sentence to either imprisonment or lashes, but not to both; Visser might have been sentenced either to twelve months' imprisonment

(a) [With this case compare *Queen vs. Kolele*, 2 Buch. E. D. C. 93; *Queen vs. Ruiter*, 2 Buch. E. D. C. 162.—ED.]

or to thirty-six lashes ; as it is the lashes must be struck out. I may observe that the record is of intolerable length, and five-sixths of the statements contained in it are hearsay. This Assistant Magistrate has frequently been cautioned against his habit of encumbering his records with everything which everybody said to everybody else, whether in the presence of the prisoner or not, from the time the offence was committed to the time when the case was brought into Court. As to the prisoner Kok, he was convicted of being an accessory and eating some of the stolen meat. There is no evidence whatever that he was accessory to the theft, or that when he ate the meat he knew that it was stolen. On the contrary, it was proved that Visser had cattle of his own and that Kok might reasonably have believed that the meat came from one of his cattle. The conviction of Kok must therefore be quashed. (a)

1883.
Sept. 18.
—
Queen vs. Visser
and Kok.

QUEEN vs. MURTHA.

Act 46, 1882, sections 1, 11.—Act 20, 1856, section 42.—
Defamatory libel.

It is not competent for a Magistrate, on a case being remitted to him under the Libel Act, 1882, to impose a penalty beyond his ordinary jurisdiction.

JONES, J.:—A case has come before me as Judge of the week of considerable importance, with regard to the jurisdiction conferred on Magistrates by a recent statute. The accused, Mr. P. J. Murtha, was charged with the crime of publishing a defamatory libel on Mr. Rintel, the trustee in his insolvent estate. A preliminary examination was taken by the Resident Magistrate of Kimberley, and the accused was committed for trial, but the case was subsequently remitted by the Crown Prosecutor to be dealt with by the

1883.
Oct. 25.
„ 26.
—
Queen vs.
Murtha.

(a) [Compare *Queen vs. Windvogel*, 2 Buch. E. D. C. 98.—ED.]

1883.
Oct. 25.
" 26.
—
Queen vs.
Murtha.

Magistrate. The prisoner was then convicted and sentenced to pay a fine of £25 or in default of payment to be imprisoned for three months. The proceedings against the prisoner were instituted under the Libel Act, 1882, which provides as a penalty for the offence in question imprisonment with or without hard labour for any period not exceeding two years, or a fine not exceeding £500, or both such fine and imprisonment as the Court may award. The Act also provides that Magistrates shall have jurisdiction to deal with the offence only in the event of a case being remitted, after the taking of a preparatory examination, "under the provisions of the statutes in that behalf made and provided." The Act however does not provide that in such a case the Magistrate shall be entitled to impose the *maximum* penalty under the Act but rather seems to imply that he shall deal with the offence under his ordinary jurisdiction, under which, by section 42 of Act 20, 1856, he could not impose a fine exceeding £10. The question therefore is whether the Magistrate was justified in the present case in imposing a fine of £25, or whether this sentence was not *ultra vires*. I shall be glad if the Crown Prosecutor will consider whether he is prepared to support the sentence.

Postea (Oct. 26),—

Lange (for *Hoskyns, C.P.*) said that he did not feel disposed to support the amount of the fine inflicted by the Magistrate.

JONES, J.:—Then the fine will be reduced to £10. I may add that I do not think it was the intention of the Legislature that Magistrates should try cases of importance under this Act, and it seems clear that the Act confers on Magistrates no greater powers than can be exercised under their ordinary jurisdiction.

QUEEN vs. SOLOMON.

Act 3, 1861, section 29.—Act 20, 1856, section 48.—
*Preparatory examination.—Effect of remittal by Crown
 Prosecutor on new charge.*

Where a preparatory examination was taken on a charge of housebreaking with intent to commit an indecent assault, and the case was remitted by the Crown Prosecutor to be tried as one of malicious injury to property, and the prisoner was thereupon convicted by the Magistrate, under the provisions of Act 3, 1861, section 29, upon the original depositions:—Held, on review, that the proceedings should be set aside, under Act 20, 1856, section 48, and the case remitted to the Magistrate to proceed as upon an original charge of malicious injury to property.

LAURENCE, J.:—A prisoner named Jan Solomon was charged before the Police Magistrate of Kimberley with “housebreaking with intent to commit an indecent assault.” On this somewhat unusual charge a preparatory examination was taken, and the prisoner was committed for trial. The case was remitted by the *Crown Prosecutor* to be dealt with as a charge of “malicious injury to property.” On November 16th the prisoner was brought up and charged with this offence and pleaded “not guilty.” The depositions on the former charge were then read over, and the prisoner was convicted and sentenced to three months imprisonment with hard labour. The course adopted by the Magistrate in using the depositions made upon one charge in support of a charge of a different nature, with regard to which the prisoner had no opportunity of cross-examination, was an irregularity, and the case does not appear to be in any way distinguishable from that of *R. vs. Bamberger* (1 Juta, App. 145). A similar order must therefore be made in the present case, namely, that all the proceedings on and subsequent to November 16th be set aside, and the case remitted to the Magistrate to proceed under the remit from the *Crown Prosecutor* as upon an original charge of malicious injury to property without reference to or adoption of the evidence taken upon the charge originally brought against the prisoner.

1883.
 Nov. 23.
 —
 Queen vs.
 Solomon.

VOL. II.]

[PART II.

REPORTS OF CASES
DECIDED
IN THE HIGH COURT
OF
GRIQUALAND.

REPORTED BY

P. M. LAURENCE, LL.D.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE ;

AND

W. M. HOPLEY, B.A.,

ADVOCATE OF THE SUPREME COURT.

VOL. II.—PART II.

JANUARY to APRIL, 1884.

CAPE TOWN:

J. C. JUTA & CO.

1885.

HIGH COURT OF GRIQUALAND.

JANUARY TO APRIL, 1884

JAMES BUCHANAN [Judge President].

S. T. JONES [First Puisne Judge].

P. M. LAURENCE [Second Puisne Judge].

LEIGH HOSKYNS [Crown Prosecutor].

TABLE OF CASES REPORTED.

	PAGE
Accini <i>vs.</i> Richards	200
Alderson's Estate, <i>Re.</i> —Bank of Africa <i>vs.</i> Minshall	201
Berry <i>vs.</i> Nonne	419
Chapman <i>vs.</i> Trustee of Braham and Shilling	423
Dell <i>vs.</i> Bawden	218
Diering & Co. <i>vs.</i> Keefer	221
Feltham's Estate, <i>Re</i>	373
George <i>vs.</i> Kimberley Town Council	231
Goldschmidt & Co. <i>vs.</i> Du Toit's Pan Mining Board	195
Hill & Paddon <i>vs.</i> Borchardt	253
Keefer <i>vs.</i> Griqualand West Board of Executors and Keefer's Trustee	235
Kemp <i>vs.</i> Kimberley Licensing Court	425
Kennedy, N.O., <i>vs.</i> Haarhoff	215
London and South African Exploration Company, Limited, <i>vs.</i> Kim- berley Town Council	331
McFarland <i>vs.</i> De Beer's Mining Board	398
O'Keefe <i>vs.</i> Scott	329
Pickering <i>vs.</i> Kimberley Town Council	374
Queen <i>vs.</i> Bloem	432
———— Charlie Shangaan	433
———— Dragoonier	430
———— Forbes	211
———— Johannes	369
———— Keviet	232
———— Kleinbooi	429
———— Stephenson	428
———— Williams	433
Ramaswaay and Ramkeit <i>vs.</i> Cumming	250
Ramsammy <i>vs.</i> Vincot Sam	209
Reinach's Estate, <i>Re</i>	309
Rose Innes D. M. Co., Limited, <i>vs.</i> Central D. M. Co., Limited ..	272
Rothschild and Others <i>vs.</i> Greenstreet	229
Solomon <i>vs.</i> Cunningham	311
Standard Bank <i>vs.</i> Biden's Trustee and others	222
Thacker <i>vs.</i> Doyle	318
Warrington <i>vs.</i> Vigne and Rorke	204
Wolhuter <i>vs.</i> Foote	258

INDEX.

	PAGE
ACCOMMODATION NOTE.—See Provisional Sentence (3)	218
1. ACT 20, 1856, § 8.—See Magistrate's Jurisdiction (1)	221
2. ——— Schedule B., rule 11.—See Service of Summons in Magistrate's Court (2)	229
3. ——— Schedule B., rules 7 and 8.—See Jurisdiction of Kimberley Magistrate	329
ACT 3, 1861, §§ 25–29.—Act 17, 1867, § 6.— <i>Remitted case.</i> — <i>Right of prisoner to call fresh evidence.</i> —Where a prisoner was committed for trial for stock theft, and the Crown Prosecutor remitted the case to the Magistrate under Act 3, 1861, § 29, and Act 17, 1867, § 6, and the Magistrate refused the prisoner's request to call fresh evidence which might have proved material, the conviction was quashed. <i>Queen vs. Dragoon</i>	430
1. ACT 17, 1867.— <i>Form of criminal charges in Magistrates' Courts.</i> —56th and 57th Rules of Court.—Where a prisoner was charged before a Magistrate “under ordinary jurisdiction” with “the crime of theft, in that he stole one horse,” &c., and was sentenced under the extended jurisdiction conferred on the Magistrate by Act 17 of 1867: <i>Held, on review</i> (LAURENCE, J., <i>dubitante</i>), that the sentence must be upheld. <i>Queen vs. Johannes</i>	369
2. ——— § 6.—See Act 3, 1861	430
ACT 27, 1882, § 10.—In a prosecution under sect. 10 of Act. 27, 1882, the charge must allege, and the evidence must clearly disclose, that the language complained of was used in a street, road, public place or licensed public-house. Where the charge did not contain this allegation, the whole proceedings were quashed. <i>Queen vs. Stephenson</i>	428
ACT 4, 1883, §§ 2, 26, 32, 33, 36.— <i>Proclamation</i> 186, 1883.— <i>Board of Health.</i> — <i>Quarantine.</i> — <i>Ultra vires.</i> —By the Public Health Act, 1883, the Governor is empowered to make, and to delegate to local authorities the power of making, regulations <i>inter alia</i> for the detention and isolation of persons likely to be infected with small-pox or other infectious disease, and for the prevention of the spread of disease. By Proclamation 186 of 1883, the Governor delegated to a local authority at Kimberley the power to make regulations for the detention and isolation of persons coming from the Transvaal, where small-pox had broken out, and for preventing the spread of disease. The local authority afterwards passed a bye-law for the detention	

and isolation of certain persons not coming from the Transvaal, but inmates of a general hospital at Kimberley where an infectious disease alleged to be small-pox had broken out, and who were therefore likely to be infected with such disease: <i>Held</i> (LAURENCE, J., <i>diss.</i>), that this bye-law was not <i>ultra vires</i> , but was a competent regulation under the general power of taking measures for preventing the spread of disease, and that therefore inmates of the hospital could be legally detained by an officer appointed by the local authority to carry out such bye-law. <i>Thacker vs. Doyle</i>	318
ACT 19, 1883, § 60.—See Provisional Sentence (1)	195
1. ACT 28, 1883, § 75.—Sect. 75 of Act 28, 1883, not only imposes penalties for the sale of intoxicating liquors without a licence, but renders it an offence to do so: the words “contrary to the provisions of this Act” are to be explained by reference to the exceptions contained in sections 2 and 16. <i>Queen vs. Keviet</i> ..	232
2. — See Right of Appeal	425
1. ARREST.— <i>Assignment by peregrinus to incola of debt incurred by another peregrinus.</i> —B., a resident in Native Territory, contracted a debt to C. in the Transvaal State. C. assigned the debt to H. & P., merchants of Kimberley. On B. coming to Kimberley, H. & P. arrested him to found jurisdiction: <i>Held</i> , that the arrest must be confirmed. <i>Hill & Paddon vs. Borchardt</i>	253
2. — 9th Rule of Court.— <i>False imprisonment and malicious prosecution.</i> —An objection to a writ of arrest, that it was not endorsed with the address of the plaintiff’s attorney, sustained. N. had been arrested and charged with theft on information sworn by B., a resident in the Free State, and the charge had been dismissed. N. then brought an action against B. for false imprisonment and malicious prosecution, and caused him to be arrested <i>iudicium sisti</i> . An application by B. for the cancellation of the bail-bond was refused. <i>Berry vs. Nonne</i>	419
ASSESSMENT COURT, PROCEEDINGS OF.—See Ord. 17, 1879, G. W. (1) ..	331
ASSIGNMENT BY PEREGRINUS TO INCOLA OF DEBT INCURRED BY ANOTHER PEREGRINUS.—See Arrest (1)	253
AUCTIONEER.—See Sale by Auctioneer for Undisclosed Principal ..	204
AVERMENT OF POSSESSION OF STOLEN GOODS.—See Theft (2 and 3) ..	432, 433
BALANCE OF ACCOUNT.—See Magistrate’s Jurisdiction (1)	221
BOARD OF HEALTH.—See Act 4, 1883	318
BONÀ FIDE TRAVELLER.—See Ordinance 19, 1880, G. W.	211
BURDEN OF PROOF.—See Ordinance 19, 1880	211
CHARTER OF JUSTICE.—See Right of Appeal	425
COMPULSORY SEQUESTRATION.—See Insolvency (2)	373
CONSENSUS AD IDEM.—See Contract for Amalgamation of Joint-Stock Companies	272
CONSTRUCTION OF WRITTEN DOCUMENTS.—See Letting and Hiring ..	311

CONTRACT BETWEEN AGENT AND CLIENT.— <i>Magistrate's Court pleadings.—Effect of denial of contract, followed by plea of tender.</i> —Where an agent sued on an alleged contract for payment of an agreed sum for the defence of certain persons in a criminal case, who after the alleged agreement had employed another agent to defend them, and the defendants denied the contract but pleaded a tender of a certain sum for the services actually rendered by the plaintiff: <i>Held, on appeal</i> , that the plaintiff had not proved the contract, and that the tender did not constitute such an admission as to entitle him to judgment for more than the amount tendered. <i>Ramaswamy and Ramkeet vs. Cumming</i>	250
CONTRACT FOR AMALGAMATION OF JOINT-STOCK COMPANIES.— <i>Powers of Directors.—Ultra vires.—Consensus ad idem.—Costs.</i> —Two Mining Companies having entered into negotiations for the amalgamation of their holdings, the directors of the respective Companies were empowered, in accordance with the provisions of the trust-deeds, to complete the amalgamation and arrange the details, on the basis of a scheme accepted by the shareholders of both Companies. A sub-committee was then appointed by each directorate to effect this object, and they entered into an arrangement, which was <i>intra vires</i> , as to one of the points requiring settlement on the aforesaid basis, in consideration of an arrangement as to another point, which was held to be <i>ultra vires</i> . The one Company attempted to enforce the contract for amalgamation (which had already been partially carried out), including the term of the agreement effected as aforesaid, which was <i>intra vires</i> , but excluding the other; the other Company pleaded that the contract included both the above terms: <i>Held</i> , that, as the term which was <i>intra vires</i> was agreed to in consideration of that which was <i>ultra vires</i> , and as, with the exception of this arrangement, the directors had omitted to complete the amalgamation and arrange the details, as instructed by the shareholders, there had been no <i>consensus ad idem</i> , and there was consequently no completed contract between the parties: <i>Held also</i> , that, while the defendant Company was entitled to absolution from the instance on the grounds set forth, as both parties had failed to prove their case, and were equally responsible for the failure of the negotiations, there should be no order as to costs. <i>Rose Innes D. M. Co., Limited, vs. Central D. M. Co., Limited</i>	272
1. COSTS.—See <i>Magistrate's Discretion</i>	209
2. ——— See <i>Contract for Amalgamation of Joint-Stock Companies</i> ..	272
3. ——— See <i>Mining Boards (2)</i>	398
CREDITORS, LIABILITY OF TO CONTRIBUTE TO DEFICIENCY INCURRED BEFORE FILING THEIR PROOFS.—See <i>Ord. 6, 1843 (1)</i>	222
DELIVERY OF TITLE-DEEDS OF IMMOVABLE PROPERTY. — See <i>Equitable Mortgage</i>	423

	PAGE
DEED OF SALE.—See Letting and Hiring	311
DENIAL OF CONTRACT FOLLOWED BY PLEA OF TENDER, EFFECT OF.— See Contract between Agent and Client	250
ELECTION.—See Trustee (1)	201
EQUITABLE MORTGAGE.— <i>Delivery of title-deeds of immovable property.—Preferent creditor.—Plan of distribution.</i> —The mere delivery of title-deeds as security for a debt does not constitute by the law of this Colony an equitable mortgage on the property; and the holder of such security ranks only as a concurrent creditor in insolvency. <i>Chapman vs. Trustee of Braham and Shilling</i>	423
EVICTON.—See Sale by Auctioneer for Undisclosed Principal ..	204
1. EVIDENCE.—See Act 3, 1861	430
2. —, IMPROPER ADMISSION OF.—See Theft (2)	432
EXCEPTIONS AND PROVISOS IN PENAL STATUTES.—See Ord. 19, 1880, G. W.	211
EXECUTOR'S ACCOUNTS.—See Principal and Surety	215
FALSE IMPRISONMENT AND MALICIOUS PROSECUTION.—See Arrest (2)	419
FORM OF CRIMINAL CHARGES IN MAGISTRATES' COURTS.—See Act 17, 1867 (1)	369
INDIVIDUAL PARTNERS, LIABILITY OF, FOR DEBT OF FIRM.—See Service of Summons in Magistrate's Court (2)	229
1. INSOLVENCY.— <i>Trustee's lien.—Reversionary rights.—Effect of rehabilitation.</i> —R., trustee of the insolvent estate of K., handed over to K., for what purpose was in dispute between the parties, certain leases in his estate upon the security of which, or of the reversionary interest in which, K. obtained a loan from E., a Board of which R. was the secretary, R. negotiating the loan, for the purpose of paying off his creditors. Subsequently K. obtained an order for rehabilitation without opposition; the trustee paid the creditors dividends, amounting to 20s. in the £, but no accounts were filed, and the estate was not wound up. K. then desired to pay off E., and applied for the leases, tendering the amount due on the loan. E. refused to give them up, and denied possession of them, on the ground that they were held by R., in his capacity as trustee of the estate, as security for the payment of his commission and of interest still due to creditors. K. then brought an action against E. for the delivery of the leases on payment of the amount due, and the Court ordered R. to intervene as co-defendant: <i>Held</i> , that R. as trustee had parted with the leases and had no lien on them, and that E. must give them up to K. on payment of the amount due, but that K. must give security to R. for the amount still claimed by him as trustee. <i>Keefe vs. Griqualand West Board of Executors and Keefe's Trustee</i>	235
2. — Compulsory sequestration.— <i>Partnership and private estate.</i>	

—Where a partnership estate had been sequestrated on a creditor's petition, and another creditor subsequently applied for the sequestration of the estate of one of the partners, and no writ had been taken out against the private estate, and there was no proof of any act of insolvency committed by the partner in his private capacity, the Court dismissed the petition. *In re estate of Feltham* 373

JURISDICTION OF KIMBERLEY MAGISTRATE.—*Mandamus to issue summons.*—*Proclamations* 69 of 1871 and 41 of 1872, and *Ordinance* 8 of 1879, *G. W.*—*Act* 20, 1856, *Schedule B.*, *Rules* 7 and 8.—Where the clerk of the Resident Magistrate of the District of Kimberley had refused to issue summons against a defendant residing at Du Toit's Pan, on the ground that no reason was assigned why the case should not be tried in the Additional Magistrate's Court at Du Toit's Pan, the Court granted an order on the clerk to issue the summons, holding that he had no discretion to refuse to do so. *O'Keefe vs. Scott* 329

LATERAL SUPPORT.—See Mining Boards (2) 398

LETTING AND HIRING.—*Pledge of movables.*—*Deed of sale.*—*Use and occupation.*—*Construction of written documents.*—S. bought a piano, the property of R. C., at an execution sale, took possession, and subsequently let it for three months to A. C., the brother of the former owner, a printed form of lease being used in which the amount of the rent was not filled in. The lease gave A. C. a right of pre-emption, on payment to S. of the purchase price at any time during the continuance of the lease, which further stipulated that, if either party were desirous of terminating the agreement at the end of the three months, he should give one month's notice of his intention. The piano remained in the possession either of A. C. or R. C. (which of them was actually in possession was disputed) for several months, after which S. brought an action against A. C. for "rent, use and occupation" at the rate of 30s. a month, and gave evidence that he had obtained a rent of 20s. a month for an inferior instrument. The defendant denied that the piano had ever been in his possession, and alleged that the lease was merely intended to operate as a security for the repayment of the purchase-money, which had really been lent by S. to R. C.: *Held, on appeal* (JONES, J., *diss.*), that the documents executed by the parties to the action must, as between the parties, speak for themselves, and that A. C. could not deny the ownership of S., or his own use and occupation, and must be ordered to pay for the latter at the rate of £1 per month. *Solomon vs. Cunningham* 311

LIQUIDATION AND CONTRIBUTION ACCOUNT.—See Ord. 6, 1843 (1) .. 222

MAGISTRATE'S COURT PLEADINGS.—See Contract between Agent and Client 250

MAGISTRATE'S DISCRETION.—*Costs.*—Where a Magistrate gave judg-

ment substantially in favour of a plaintiff in an action of debt, but ordered the plaintiff to pay the costs of the action on the ground that his motives for suing the defendant were unsatisfactory: <i>Held, on appeal</i> , that the Magistrate had not exercised a judicial discretion, and that the judgment as to costs must be reversed. <i>Ramsammy vs. Vincot Sam</i>	209
1. MAGISTRATE'S JURISDICTION.— <i>Act</i> 20, 1856, § 8.— <i>Ordinance</i> 13, 1874, <i>G. W.</i> , § 3.— <i>Balance of Account</i> .—Where the claim of a plaintiff has been reduced before action brought by a cash payment to an amount within the jurisdiction of the Resident Magistrate, he should sue for the balance in the Magistrate's Court, and if he sues in the High Court only Magistrate's Court costs will be allowed. <i>Diering & Co. vs. Keefer</i>	221
2. — See Jurisdiction of Kimberley Magistrate	329
MALICIOUS INJURY TO PROPERTY.—Where a prisoner was charged with malicious injury to property, and the Magistrate found him guilty only of "damaging" the property, the conviction was quashed. <i>Queen vs. Charlie Shangaan</i>	433
MALICIOUS PROSECUTION.—See Arrest (2)	419
MANDAMUS TO ISSUE SUMMONS.—See Jurisdiction of Kimberley Magistrate	329
MINING AREA.—See Mining Boards (2)	398
1. MINING BOARDS.—See Provisional Sentence (1)	195
2. —, POWERS AND DUTIES OF.— <i>Proclamation</i> 6 of 1874 and <i>Ordinance</i> 21, 1880, <i>G. W.</i> — <i>Mining area</i> .— <i>Lateral support</i> .— <i>Costs</i> .—By a local Proclamation and Ordinance, the De Beer's Mining Board has jurisdiction over a certain mining area, which is defined as limited by the boundary of the Vooruitzigt estate. The Board is empowered to levy rates for the removal of reef, &c., on the various sections into which the mine is divided, and its bye-laws provide that the rates levied on each section shall be expended solely on the removal of reef, &c., which may fall into or become dangerous to that section: <i>Held</i> , that the Board, having levied rates on a certain section in the mine, was not thereby rendered liable to remove or pay for the removal of certain reef which had fallen into or become dangerous to that section, but which came from private property outside the Vooruitzigt estate, and over which the Board had no statutory jurisdiction, and the owners of which were entitled, as against the proprietors of the mining area, to lateral support. <i>McFarland vs. De Beer's Mining Board</i>	398
MISTAKE OF LAW.— <i>Municipal regulations</i> .—Where certain moneys had been paid in satisfaction of a municipal rate, and the payment had been made either voluntarily, in order to test the validity of the rate, or under mistake of law: <i>Held, on appeal</i> , that the payment could not be recovered back. <i>George vs. Kimberley Town Council</i>	231
MOTION TO SET ASIDE JUDGMENT AND RE-OPEN CASE.—See Rule of Court 329	258

	PAGE
MUNICIPAL BYE-LAWS.—See Ord. 17, 1879, G. W. (2)	374
MUNICIPAL REGULATIONS.—See Mistake of Law	231
NOMINAL HOLDER.—See Provisional Sentence (3)	218
ORDINANCE 40, 1828, § 5.—See Ord. 17, 1879, G. W. (1)	331
1. ORDINANCE 6, 1843, §§ 8, 30, 44, 58, 111.— <i>Liquidation and contribution account.</i> — <i>Secured creditors.</i> — <i>Liability of creditors to contribute to deficiency incurred before filing of their proofs.</i> — <i>Remuneration of trustee.</i> —Creditors who have proved on an insolvent estate in which there is a contribution account are liable to contribute, although the expenses were incurred before they filed their proofs. Where a secured creditor has valued and retained his securities with the consent of the trustee, the latter is not entitled to charge commission on the value of such securities. Where the Master had allowed the trustee certain special remuneration, in addition to his commission, on account of his loss of time and trouble in conducting a lawsuit and other matters connected with the administration, the Court, in the absence of satisfactory evidence of exceptional circumstances to justify such special remuneration, disallowed the charge.	
<i>Standard Bank vs. Biden's Trustee and Others</i>	222
2. — § 44.—Where the trustee of an insolvent estate, in consequence of exceptional circumstances in the administration, had been allowed commission at the rate of 5 per cent. on the sale of immovables in the liquidation account, and at the rate of 2½ per cent. on disbursements appearing in the contribution account: <i>Held</i> , that it was not competent for the Master to allow him special remuneration by way of bonus, in addition.	
<i>In re Estate of Reinach</i>	309
ORDINANCE 10, 1874, G. W.—See Provisional Sentence (1)	195
ORDINANCE 13, 1874, G. W.—See Magistrate's Jurisdiction (1)	221
ORDINANCE 8, 1879, G. W.—See Jurisdiction of Kimberley Magistrate	329
ORDINANCE 15, 1879, G. W.—See Provisional Sentence (1)	195
1. ORDINANCE 17, 1879, G. W.— <i>Ordinance 40, 1828, § 5.</i> — <i>190th Rule of Court.</i> — <i>Valuation of immovable property.</i> — <i>Proceedings of Assessment Court.</i> —By the Kimberley Municipality Ordinance, 1879, Griqualand West, the Town Council is empowered to appoint "one or more competent appraisers" of immovable property within the Municipality; on a valuation being made by them and an assessment roll compiled, it lies open for inspection, after which an Assessment Court of the Council sits for the purpose of hearing objections to the valuation, and it is further enacted by sect. 74 that "the decision of the Council upon any objection to any valuation shall be final and conclusive, and shall not be capable of being reviewed or reversed by any Court or proceeding whatever." The Town Council appointed an appraiser who valued certain waste lands, the property of the applicant Company, which in previous years	

had been valued at the sum of £40,000, which valuation was alleged to be excessive, at the sum of £633,500, proceeding on the basis that all these lands might be utilised for building purposes. On objection being taken before the Assessment Court, the valuation was reduced to £500,000. Application was then made to the Court to set aside the valuation, on the grounds that it was arbitrary, fanciful, *mala fide*, &c., and on the ground that the valuator was not a competent appraiser within the meaning of the Ordinance, and on the further ground that the Assessment Court had acted illegally in sitting with closed doors: *Held*, that notwithstanding sect. 74 the Court had power to set aside the valuation, on the grounds that the facts shewed that the respondents had failed to employ a competent appraiser, and that his appraisal was a mere arbitrary estimate, and not a valuation at all: *Held also*, that the holding of the Assessment Court with closed doors was irregular and improper, though it might not in itself have furnished a sufficient ground for setting aside the proceedings. *London and South African Exploration Co., Limited, vs. Kimberley Town Council* 331

2. ORDINANCE 17, 1879, G. W.—*Municipal bye-laws.—Ultra vires.*—The Kimberley Municipality, acting under the provisions of a local Ordinance, framed a bye-law, which was duly promulgated, requiring the licensing of vehicles, not plied for hire, whose owners resided within the municipality; the Ordinance provided for the licensing of vehicles plied for hire, and also empowered the municipality to make regulations for the suppression of nuisances and all such purposes as might appear to be advantageous and convenient for the municipality. P., as the accredited agent of a Mining Company owning vehicles not plied for hire, for which no licence had been taken out, was convicted of contravening the above bye-law: *Held, on appeal*, that the bye-law was *ultra vires* and the conviction must be quashed. *Pickering vs. Kimberley Town Council* 374

ORDINANCE 19, 1880, G. W. §§ 5, 6, 11.—*Liability of trustee as transferee of liquor licence—Exceptions and provisoes in penal statutes.—Burden of proof.*—The trustee of an insolvent estate obtained transfer to himself of a liquor licence held by the insolvent, and appointed a manager who contravened the liquor laws. The trustee having been convicted for this contravention, the conviction was sustained on appeal. Where one section of an Act makes it an offence to sell liquor in prohibited hours, and a subsequent section allows the sale within such hours to *bonâ fide* travellers, the burden of proving that the purchaser in any particular case was a *bonâ fide* traveller lies on the defence, and it is unnecessary for the qualification of the purchaser to be negatived in the summons. *Queen vs. Forbes* 211

ORDINANCE 21, 1880, G. W.—See Mining Boards (2) 398

	PAGE
1. PARTNERSHIP.—See Service of Summons in Magistrate's Court (2)	229
2. —, PLACE OF BUSINESS OF.—See Rule of Court 329	258
PARTNERSHIP AND PRIVATE ESTATE.—See Insolvency (2)	373
PLAN OF DISTRIBUTION.—See Equitable Mortgage	423
PLEDGE OF MOVABLES.—See Letting and Hiring .. * ..	311
POWERS OF DIRECTORS.—See Contract for Amalgamation of Joint- Stock Companies	272
PREFERENT CREDITOR.—See Equitable Mortgage	423
PRINCIPAL AND SURETY.— <i>Executor's accounts.—Obligation of surety and co-principal debtor.—Provisional sentence.</i> —D. H. had bound himself, nearly eight years before the present proceed- ings, as surety and co-principal debtor, for the due fulfilment by J. H. of his duties as executor dative. J. H. had left the country and had filed no account as executor, and was believed to be dead. Provisional sentence was granted against D. H. on the bond. <i>Kennedy, N.O., vs. Haarhoff</i>	215
PROCLAMATIONS 69 OF 1871 AND 41 OF 1872, G. W.—See Juris- diction of Kimberley Magistrate	329
PROCLAMATION 6 OF 1874, G. W.—See Mining Boards (2)	398
— 8 OF 1880, G. W.—See Provisional Sentence (1)	195
— 186 OF 1883.—See Act 4, 1883	318
1. PROVISIONAL SENTENCE.— <i>Ordinances 10 of 1874 and 15 of 1879, and Proclamation 8 of 1880, G. W.—Act 19, 1883, § 60.— Mining Boards.</i> —Provisional Sentence refused against a Mining Board, on certain promissory notes made by the Chairman of a former Board for the same mine, where it appeared that it was open to doubt whether, on the true construction of certain local enactments, the former Mining Board was a legally constituted body at the time of the making of the said notes, and it was also doubtful whether the Chairman was duly authorised and empowered to make the notes on behalf of the said Board. <i>Goldschmidt and Co. vs. Du Toit's Pan Mining Board</i>	195
2. — See Principal and Surety	215
3. — <i>Accommodation note.—Nominal holder.</i> —Where B. made an accommodation note in favour of S., who endorsed it in blank and passed it to a bank as collateral security for his liability, provisional sentence was granted against B. at the suit of a plaintiff who was a nominal holder on behalf of the bank, in the absence of any proof that the plaintiff was not duly authorised to sue on the note. <i>Dell vs. Burden</i>	218
PROVISIONAL TRUSTEES, APPOINTMENT OF.—See Trustee (1) ..	201
QUARANTINE.—See Act 4, 1883	318
REHABILITATION, EFFECT OF.—See Insolvency (1)	235
REMITTED CASE.—See Act 3, 1861	430
REMOVAL OF BAR.—See Rules of Court of 1880	200
REVERSIONARY RIGHTS.—See Insolvency (1)	235
RIGHT OF APPEAL.—Act 28, 1883.— <i>Charter of Justice.</i> —19 th Rule	

<i>of Court.</i> —There is no appeal from a decision of a Licensing Court sitting under Act 28, 1883. If such Court exercises its powers in an illegal or improper manner, the proper remedy is to apply for the process of the Court under the 190th Rule of Court. <i>Kemp vs. Kimberley Licensing Court</i>	425
RIGHT OF PRISONER TO CALL FRESH EVIDENCE.—See Act 3, 1861 ..	430
RULE OF COURT NO. 9.—See Arrest (2)	419
— Nos. 56 AND 57.—See Act 17, 1867 (1).. ..	369
1. — No. 190.—See Ord. 17, 1879, G. W. (1)	331
2. ————— See Right of Appeal	425
— No. 329.— <i>Motion to set aside judgment and re-open case.</i> — <i>Service of summons.</i> — <i>Place of business of partnership.</i> —F., the secretary of a partnership association, obtained judgment against the association, by default of appearance, for an amount alleged to be due to him for salary and commission. The summons purported to have been served on the chairman of the association, at its office or place of business. W., one of the partners, subsequently applied to the Court to set aside the judgment on the grounds that the service had been at the place of business of the chairman and not at that of the association, and also that he had a good ground of defence to the claim owing to the negligent performance by F. of his duties as secretary, whereby he had sustained damage. F. alleged that the summons had been duly served on one of the partners at the place of business of the association, and also denied the alleged negligence, and in such denial was supported by the evidence of the chairman and of three other partners: <i>Held</i> (LAURENCE, J., <i>diss.</i>), that the office where the summons was served was not the place of business of the association, and the service was therefore bad; and that, as the applicant had disclosed <i>prima facie</i> grounds of defence, the judgment must be set aside and the case re-opened on condition of W. giving security both for the amount claimed and for the costs of all the proceedings. <i>Wolhuter vs. Foote</i> ..	258
RULES OF COURT OF 1880, RULE 6, PAR. 4.— <i>Removal of bar.</i> —Where a copy of a declaration had been served on a defendant, which did not shew, on the face of it or otherwise, the date on which it had been filed, and the defendant had been subsequently barred from pleading: <i>Held</i> , that the defendant was entitled to have the bar removed unconditionally, and to have the usual time for pleading from the date of the application. <i>Accini vs. Richards</i>	200
SALE BY AUCTIONEER FOR UNDISCLOSED PRINCIPAL.— <i>Warranty against eviction.</i> —Where an auctioneer sold goods without disclosing his principal, and gave his own receipt for the purchase-money, and the purchaser was subsequently evicted by the owner: <i>Held</i> , that the purchaser was entitled to recover the purchase-money and costs of the eviction from the auctioneer. <i>Warrington vs. Vigne and Rorke</i>	204

SECURED CREDITORS.—See Ord. 6, 1843 (1)	PAGE 222
1. SERVICE OF SUMMONS.—See Rule of Court 329	258
2. — IN MAGISTRATE'S COURT.— <i>Liability of individual partners for debt of firm.</i> —Act 20, 1856, Schedule B, Rule 11.—Where a firm had been summoned in the Magistrate's Court for a partnership debt, and service had been effected on some of the partners, and the Magistrate gave judgment against the partners who had been served in their individual capacity: <i>Held, on appeal</i> , that the judgment must be reversed. <i>Rothschild and Others vs. Greenstreet</i>	229
SURETY AND CO-PRINCIPAL DEBTOR, OBLIGATION OF.—See Principal and Surety	215
1. THEFT.—Where a prisoner was charged with the crime of theft, and the Magistrate found him “guilty of being in possession of stolen property without being able to account for the same,” the conviction was quashed. <i>Queen vs. Kleinbooi</i>	429
2. —, CHARGE OF.— <i>Averment of possession of goods stolen.</i> — <i>Improper admission of evidence.</i> —Where a prisoner was charged before a Magistrate with stealing goods “from the store of H. and P.,” and pleaded guilty: <i>Held, on review</i> , that there was a sufficient implication that the goods were in the lawful possession of H. and P. The magistrate having improperly admitted certain evidence of which the object was to aggravate the sentence: <i>Held</i> , as it did not appear that the sentence had in fact been aggravated in consequence, or that the punishment was excessive, that the sentence must be upheld. <i>Queen vs. Bloem</i>	432
3. — <i>Averment of ownership or possession of stolen goods essential to charge.</i> —Where a prisoner pleaded guilty to and was convicted of a charge of theft, and the charge failed to lay the property or possession of the stolen articles in anybody, the conviction was quashed. <i>Queen vs. Williams</i>	433
1. TRUSTEE.— <i>Election.</i> — <i>Appointment of Provisional Trustees.</i> —Where the majority in number of creditors was opposed to the majority in value as to the election of a trustee or trustees in an insolvent estate, and it appeared that, if a certain proof which had been rejected by the Master were allowed by the Court, the majority in number and value would be agreed, and an application was about to be made to the Court for that purpose, the Court appointed provisional trustees of the estate, but refused to give them any special powers. <i>Re Estate of Alderson.—Bank of Africa vs. Minshall</i>	201
2. —, LIABILITY OF, AS TRANSFEREE OF LIQUOR LICENCE. See Ord. 19, 1880	211
3. —, REMUNERATION OF. —See Ord. 6, 1843 (1)	222
TRUSTEE'S LIEN. —See Insolvency (1)	235
1. ULTRA VIRES. See Contract for Amalgamation of Joint-Stock Companies	272

	PAGE
2. ULTRA VIRES.—See Act 4, 1883	318
3. ——— See Ord. 17, 1879, G. W. (2)	374
USE AND OCCUPATION.—See Letting and Hiring	311
VALUATION OF IMMOVABLE PROPERTY.—See Ord. 17, 1879, G. W. (1)	331
WARRANTY AGAINST EVICTION.—See Sale by Auctioneer for Undis- closed Principal	204

CASES DECIDED

IN THE

HIGH COURT OF GRIQUALAND.

VOL. II.—PART II.

GOLDSCHMIDT & CO. *vs.* DU TOIT'S PAN MINING BOARD.

Provisional sentence.—Ordinances 10 of 1874 and 15 of 1879, and Proclamation 8 of 1880, Griqualand West.
—Act 19, 1883, sect. 60.—Mining Boards.

Provisional sentence refused against a Mining Board, on certain promissory notes made by the Chairman of a former Board for the same mine, where it appeared that it was open to doubt whether, on the true construction of certain local enactments, the former Mining Board was a legally constituted body at the time of the making of the said notes, and it was also doubtful whether the chairman was duly authorised and empowered to make the notes on behalf of the said Board.

Provisional sentence was claimed for the sum of £2210 5s. 6d., together with interest from the 15th of March, 1881, upon two dishonoured promissory notes, each for the sum of £1105 2s. 9d., made on 15th December, 1880, by the then chairman of the Du Toit's Pan Mining Board, in his capacity as chairman, and due on the 15th of March, 1881, in favour of Solomon & Cohen or order, and by them endorsed in blank. The plaintiffs were now the legal holders.

1884.
Jan. 25.

Goldschmidt &
Co. *vs.* Du Toit's
Pan Mining
Board.

1884.
Jan. 25.

Goldschmidt &
Co. vs. Du Toit's
Pan Mining
Board.

Forster, for the plaintiffs, prayed provisional sentence, and produced the notes.

Hoskyns, C.P., for the defendants, produced the affidavit of Captain Yonge, the present Chairman of the Du Toit's Pan Mining Board, which alleged that the notes now sued upon were given in renewal of notes for the same amounts given originally in settlement of a claim by Solomon & Cohen arising out of a pumping contract entered into between the Board and Solomon & Cohen with reference to draining a certain portion of the mine; and that the original notes had been given under the distinct understanding by a guarantee in writing, now lost, that they should be renewed from time to time until funds for their payment had been collected; that, though the said Board had levied a rate on the section of the mine in which the draining took place to satisfy the said promissory notes, it was not sanctioned by the Government, and consequently it was not recoverable, and was not collected from the claimholders in the said section; that one of the partners of the present holders was at the time these liabilities were incurred a member of the Du Toit's Pan Mining Board, and that both Solomon & Cohen and Goldschmidt & Co. were at that time large owners of claims in the section of the mine which was benefited by the pumping contract in question. The affidavit further alleged that deponent had made search in the records and bye-laws of the said Mining Board, but that he had been unable to find the authority of the maker of the notes now sued upon to make them on behalf of the Board, and that the deponent was advised that, at the date of the making of the notes, the said Board had no legal existence.

Answering affidavits for the plaintiffs were produced to the effect that the rate had been levied and subsequently allowed by the Government, and that, from the minutes of the Board, it appeared that the Board at one of its meetings had expressly authorised the then chairman to sign the notes now sued upon. The affidavit of Mr. Solomon, one of the partners of Solomon & Cohen, also denied that any written guarantee was ever given by his firm that the notes originally given should be renewed from time to time until funds had been collected to meet them. Extracts from the minutes

of the Board were annexed in support of the plaintiffs' affidavits.

Hoskyns, C.P., for the defendants, contended in the first place that there was nothing to shew that the Du Toit's Pan Mining Board had any legal existence in December 1880. It was very questionable whether or no the Proclamation 8 of 1880, purporting to cancel the rules and regulations contained in the schedule to Ordinance 10, 1874, was *ultra vires*. Ordinance 15, 1879, which is not cancelled by Proclamation 8 of 1880, enacts that the regulations of the schedule to Ordinance 10, 1874, in so far as they do not conflict with the private rights of the owners, shall remain in full force until cancelled, altered, or amended, in so far as they relate to mines not situated on Crown lands, such as Du Toit's Pan mine. Proclamation 8 of 1880 cancelled the schedule to Ordinance 10, 1874, for all mines, and therefore *primâ facie* for the Du Toit's Pan mine. The Mining Board of that mine, however, continued to exist under the schedule to Ordinance 10, 1874, but, that schedule having been repealed, they had no legal existence at the time these notes were made, although they existed *de facto*. The plaintiffs, to succeed in their present action, must shew that the Proclamation 8 of 1880 was *ultra vires*, and there is nothing to indicate that such is the case. If that Proclamation was not *ultra vires*, the then Mining Board, having no legal existence, were not the predecessors of the present Mining Board, now defendant, and this in spite of section 60 of Act 19, 1883, for that section only applies to legally constituted bodies. The proper remedy for the plaintiffs was against the members of the former *de facto* Board, or their chairman, for breach of implied warranty. In the second place, he contended that provisional sentence should not be granted because of the promise to renew, of which, in the circumstances of the present case, the present holders, who had been connected in business with the payees, must have been perfectly aware. The plaintiffs had not performed their part of the compact, and consequently could not now sue, and at all events they had taken the note with all the equities. Again, there was nothing in the provisions of Ordinance 10 of 1874 authorising the chairman of the

1884.
Jan. 25.

Goldschmidt &
Co. vs. Du Toit's
Pan Mining
Board.

1884.
Jan. 25.
—
Goldschmidt &
Co. vs. Du Toit's
Pan Mining
Board.

Board to sign promissory notes. If he signed the note *ultra vires*, without getting a guarantee, the present Board is not bound by his act. The only authority to the chairman to sign the note was the resolution of the Board, and it was questionable whether that resolution itself was not *ultra vires*.

Forster, for the plaintiffs, submitted that the only serious argument for the defendant rested on the hypothesis that Proclamation 8 of 1880 repealed the schedule to Ordinance 10, 1874. In December 1880 there was at all events a *de facto* Board for Du Toit's Pan mine, which acted, held meetings, minutes of which were duly kept and recorded, and which conducted business in every way as an ordinary legally constituted Mining Board would do. Ordinance 15, 1879, had been passed for the purpose of setting at rest certain doubts as to the applicability of the rules, &c., in the schedule to Ordinance 10, 1874, to private mines. Its object was explained clearly by the preamble. It took over the rules, &c., in that schedule, and declared them to remain in force until they were legally cancelled, altered, or amended for the particular mine or digging in question. Apart from the fact that an Ordinance cannot be repealed by a mere Proclamation, such as Proclamation 8 of 1880, the repeal to affect Du Toit's Pan mine would have to be specific with regard to it; and if the legislation of Ordinance 15, 1879, is to fall by the repeal of the schedule to Ordinance 10 of 1874, it only falls for such mines as are specifically set forth. The regulations made applicable to Du Toit's Pan by Ordinance 15, 1879, have never been repealed, since Proclamation 8 of 1880 only repeals the schedule to Ordinance 10, 1874, for mines on Crown land, or for mines on private properties in which the precious stones, &c., belong to the Crown.

LAURENCE, J.:—It is certainly a somewhat difficult question whether the Du Toit's Pan Mining Board in December, 1880, when these notes were made by the Chairman, had any legal existence, or whether it was not then only a *de facto* existing body. Ordinance 10, 1874, contained a schedule laying down rules and regulations for the management of

diggings and mines of precious stones and minerals on Crown lands, or on private properties in which the precious stones and minerals belong to the Crown, in the province of Griqualand West. A doubt having arisen whether these rules could apply to the management of mines on private properties where there was no similar reservation of the precious stones and minerals to the Crown, Ordinance 15 of 1879 was enacted, applying certain of these rules, &c., to the Du Toit's Pan and Bultfontein mines, situate on private property, where there was no such reservation. Then Proclamation 8 of 1880 purports to entirely cancel and abolish the rules, &c., contained in the schedule to Ordinance 10, 1874, and, as such cancellation was clearly contemplated and provided for by the Ordinance of 1879, it is at all events open to grave doubt whether the Proclamation of 1880, so far as it apparently purports to include the Du Toit's Pan mine among those as to which the former rules were abolished, was really *ultra vires*, as contended on behalf of the plaintiffs. If it was not *ultra vires* in this respect, the Du Toit's Pan Mining Board in December 1880 apparently had no legal existence, and the present Board cannot be bound by its acts or by those of its chairman. This is certainly a very grave and important question, which I do not feel bound or inclined to decide upon an application for provisional sentence. There is a further question, even if the former Board was at the time a legally constituted body, whether the chairman had any power to make promissory notes on its behalf. It is by no means clear, on the evidence at present before the Court, that such was the case. I need not enter into the other grounds upon which provisional sentence has been opposed, as, for the reasons already mentioned, I am clearly of opinion that this is not a case for provision, and that the present application must therefore be refused, with costs.

1884.
Jan. 25.

—
Goldschmidt &
Co. vs. Du Toit's
Pan Mining
Board.

[Plaintiffs' Attorneys, CORYNDON & CALDECOTT.]
[Defendants' Attorneys, HAARHOFF BROS.]

ACCINI vs. RICHARDS.

Rules of Court of 1880, Rule 6, paragraph (4).—Removal of bar.

Where a copy of a declaration had been served on a defendant, which did not shew, on the face of it or otherwise, the date on which it had been filed, and the defendant had been subsequently barred from pleading:—Held, that the defendant was entitled to have the bar removed unconditionally, and to have the usual time for pleading from the date of the application.

1884.
Jan. 25.
—
Accini vs.
Richards.

This was an application to remove a bar, and allow the defendant, the present applicant, to plead to a declaration filed by the respondent. The applicant stated in his affidavit that on January 4th he was served with a declaration in the case of *Richards vs. Accini*, and on January 12th he drew up and signed his plea, and lodged the same with the Registrar, and served a copy on the respondent's attorneys. The Registrar, however, had returned the plea on the ground that it was not signed by counsel, as required by the Rules of Court. On January 14th he had received notice to plead within 24 hours, and he had thereupon placed the matter in the hands of an attorney. There was also an affidavit by the applicant's attorney, stating that he had been instructed to defend the action on the afternoon of January 14th, and the plaintiff's declaration had then been handed him with other documents, but the copy served did not shew on the face of it when it was filed, as required by the Rules of Court of March 1880, Rule 6, paragraph (4) (Rule [330] Tennant's edition). He had instructed counsel to draw pleas the following day, and had requested the respondent's attorneys to hold over their notice of bar, which however they had refused to do. He believed the applicant had a good defence to the action. Mr. Gilbert, one of the respondent's attorneys, made an affidavit in which he stated that the applicant was a person with no means whatever, and was at present a convict in the Kimberley gaol, but the

respondent was willing to have the bar removed on condition of the applicant giving security for the costs of the action.

1884.
Jan. 25.
Accini vs.
Richards.

Levey, for the applicant, submitted that he was entitled to have the bar removed unconditionally, as the copy of the declaration served was undated. He referred to *Steytler vs. Spiegel*, 1 Juta, 282. This was a much stronger case, as there was nothing whatever on the service copy of the declaration to shew the date. Here too the defendant had taken proceedings with the utmost promptitude.

Forster, contra.:—In the case quoted, the majority of the Court was of opinion there was no irregularity. If the date does not appear on the face of the declaration, that is an irregularity which can be cured by the subsequent notice to plead. The defendant here was not prejudiced, as he knew he had the declaration, and was required to plead to it.

Levey said the defendant would waive his right to fresh service of declaration, and would undertake to plead within eight days.

LAURENCE, J.:—Then the bar will be removed on those terms. There has been a clear irregularity, and a very important proviso in the Rule of Court as to service of pleadings has not been complied with. In all the circumstances, I think there should be no order as to the costs of this application.

[Applicant's Attorney, CAMPBELL.
Respondent's Attorneys, GRAHAM & GILBERT.]

Re ESTATE OF ALDERSON.—BANK OF AFRICA *vs.*
MINSHALL.

Trustee.—Election.—Appointment of Provisional Trustees.

Where the majority in number of creditors was opposed to the majority in value as to the election of a trustee or trustees in an insolvent estate, and it appeared that, if a certain

proof which had been rejected by the Master were allowed by the Court, the majority in number and value would be agreed, and an application was about to be made to the Court for that purpose, the Court appointed provisional trustees of the estate, but refused to give them any special powers.

1884.

Jan. 25.

—
Re Estate of
Alderson.
Bank of Africa
vs. Minshall.

This was an application for the appointment of George Richards and William Henry Craven to be liquidators of the insolvent estate of William Alderson, to investigate the affairs thereof and administer the same, with all such powers and authorities as are given to trustees in insolvent estates, or for such other relief as in the circumstances might seem meet. The application was supported by the petition of J. R. Kerr, manager of the local branch of the Bank of Africa, who had proved a claim on the estate to the amount of £11,881 14s. 6d., with interest and costs. At the second meeting the claims of five other creditors were filed, amounting in the aggregate to about £1150. The petitioner proposed the election of Messrs. Richards and Craven as joint-trustees, while the other creditors were in favour of the election of Craven as sole trustee, and the majority in number being thus opposed to the majority in value there was no election. The circumstances of the insolvency were such that the petitioner apprehended great loss and damage, unless some fit and proper person or persons were forthwith appointed to investigate the affairs of the insolvent, and liquidate the estate. An opposing affidavit was filed by Mr. W. Minshall, who alleged that the difficulty had arisen through the improper refusal of the Master to accept his proof as a creditor on the estate for the sum of £26,500. He was about to apply to the Court to have his proof admitted, and had every reason to believe his claim would be substantiated, in which case the majority both in number and value would be in favour of the election of Craven as sole trustee. Mr. Kerr, in a replying affidavit, reviewed in detail the transactions between the insolvent and Minshall, who was his father-in-law, whose claim was alleged to be irregular and informal, and further stated that these transactions appeared to be “of such a suspicious and fraudulent nature” that he

intended to contest the claim; he added that the investigation of these matters would cause much delay, and unless an appointment were made at once, as prayed in the petition, the Bank would be greatly damnified in the premises.

1884.
Jan. 25.
—
Re Estate of
Alderson.
Bank of Africa
vs. Minshall.

Forster supported the application, and asked for the appointment of Messrs. Richards and Craven as provisional trustees, with full powers, as there was no prospect of an election.

LAURENCE, J., referred to *Graham and Ozer vs. Caldecott*, Buch. 1876, 4.

Hoskyns, C.P. (with him *Levey*), for the opposing creditors, referred to *Re Lyons Brothers*, 2 Juta, 136. In the present case there was every probability of the creditors coming to an agreement; Minshall's proof would be pressed on the Court forthwith.

In reply to the Court,

The Master stated that there was property in the estate, which in his judgment required supervision.

LAURENCE, J.:—Until the matter of Minshall's claim is decided it is impossible to say that there is no probability of the creditors arriving at an election. I think the case is one in which an order similar to that in *Graham vs. Caldecott* may properly be made, in order to protect the interests of the creditors until this question is determined. Messrs. Craven and Richards will therefore be appointed joint provisional trustees, but with no special powers, pending an election by the creditors. Should Minshall's claim be finally rejected, further application can be made. The costs of both parties will come out of the estate.

[Applicant's Attorneys, STOW & CALDECOTT.]
[Respondent's Attorney, DEWHURST.]

WARRINGTON *vs.* VIGNE & RORKE.

Sale by auctioneer for undisclosed principal.—Warranty against eviction.

Where an auctioneer sold goods without disclosing his principal, and gave his own receipt for the purchase-money, and the purchaser was subsequently evicted by the owner : Held, that the purchaser was entitled to recover the purchase-money and costs of the eviction from the auctioneer.

1884.
Jan. 25.
Feb. 15.
Warrington *vs.*
Vigne & Rorke.

Appeal from the Resident Magistrate of Kimberley. The respondents, a firm of auctioneers, had held a furniture sale, at which the appellant purchased a piano. The respondents did not disclose, either before or at the sale, the name of their principal, to whom the piano, as afterwards proved, did not belong. The owner brought an action against the appellant for the delivery up of the piano, and obtained judgment and costs. The appellant then sued the respondents (who, previously to the action, disclosed their principal at the sale) for the purchase-price of the piano, for which he had taken their receipt, and his costs incurred in the action of eviction. The Magistrate gave judgment for the defendants, with costs ; the plaintiff appealed.

Levey, for the appellant, said this was a case of an auctioneer acting as agent for an undisclosed principal, and referred to *Story on Agency*, sect. 267, and *Woolfe vs. Horne*, 2 Q. B. D. 356 (stopped *arguendo*).

Forster, contra :—The law of agency is not applicable here ; this must be taken as a case of breach of warranty : *Addison on Contracts*, 8th ed., 971. The purchaser has notice of the auctioneer's *capacity*, and there is therefore no implied warranty of the vendor's title. There was no evidence of express warranty by the defendants, and therefore the judgment in their favour was correct. An auctioneer does not warrant his principal's title, but merely that he is himself duly authorised by his principal.

LAURENCE, J., referred to *Ludwig vs. Van Reenen*, Buch. 1868, 244.

1884.
Jan. 25.
Feb. 15.

Warrington vs.
Vigne & Rorke.

Levey, in reply, cited *Chitty on Contracts*, 11th ed., 414, note, and authorities there quoted on the civil law; *Pothier on Sale*, § 83; *Grotius*, ed. Maasdorp, 376. By the Roman-Dutch law there is a general implication of warranty which applies to the case of auctioneers. Here the auctioneer gave a receipt in his own name, and there was nothing to shew for whom he was acting.

LAURENCE, J.:—I have very little doubt as to what my decision should be in this case, but as the question is one of considerable importance the Court will take time to consider its judgment.

Postea (Feb. 15),—

LAURENCE, J., said :—This is an appeal from a judgment of the Resident Magistrate for the District of Kimberley, and raises the important question whether an auctioneer, selling movable property on account of an undisclosed principal, is liable for damages sustained by the purchaser in the event of eviction. It is rather surprising, considering the importance of this question, especially in this colony, where sales by auction are so prominent and characteristic a feature of business life, that little, if any, direct authority on the point is to be found in our books. The only case to which, when the appeal was argued, I was able to refer, was that of *Ludwig vs. Van Reenen*, Buch. 1868, 244, where it was attempted to make an auctioneer liable on the ground of alleged warranty not of title but of quality, and the case turned almost entirely on the special conditions of sale. Somewhat more in point is the case of *Lee vs. Stanford* (H. C. Repp., vol. i. p. 430), on appeal, I think, from the same Magistrate, in which an evicted purchaser had recovered damages in the Magistrate's Court from the auctioneer. In that case the decision was reversed, on the ground that it was shewn that the auctioneer had warned the purchaser that the property of which he was taking possession, and from which he was subsequently

1884.
Jan. 25.
Feb. 15.

Warrington vs.
Vigne & Rorke.

evicted, was not included in the lot sold to him at the auction sale, and the purchaser took possession of the property at his own risk. In the present case the facts are different. They are shortly as follows. On September 21, 1883, the respondents issued an advertisement in a local paper, in which they described themselves as "auctioneers and appraisers," of "Vigne & Rorke's sales." They advertised a sale of house property to be removed, and certain furniture, including "one piano in good repair." The name of the owner of the property was not disclosed. The appellant attended the sale and bought the piano for £24, and received the respondent's receipt for the amount, their principal being still undisclosed. A third party subsequently claimed the piano, and succeeded in an action for its recovery against the present appellant, in which the latter had to pay the costs of both sides, amounting to £17 14s. 2d. The appellant brought an action in the Magistrate's Court to recover this amount, together with the £24 paid for the piano. The above facts were proved, and also that the respondents disclosed their principals before the action was commenced. Judgment was given for the defendants, with costs.

I am of opinion that this judgment cannot be sustained. That an agent acting for an undisclosed principal is as a general rule personally liable for the fulfilment of the contract, is clear law, both according to the English and the Roman-Dutch system. I went very fully into this question in my judgment in the case of *Preston & Dixon vs. Biden's Trustee* (H. C. Repp., vol. i. p. 248), where most of the authorities on the various heads of this branch of law were cited and discussed; and although the judgment of this Court in that case was reversed by a majority of the Judges in the Court of Appeal, that was not so much, as I understand from the judgment of the Chief Justice—those of the other learned Judges who concurred in his decision have not yet been reported—on the question of law, but rather on a question of fact, it being held that the contract was really made in that case with an agent for a principal disclosed at the time. That an auctioneer, who is more than an ordinary agent, and has a special property in the articles sold by him, if he sells on account of an undisclosed principal, is personally liable on the contract, is

also clear from the English authorities. "If an auctioneer," says *Addison*, "at a sale does not disclose the name of the vendor, but makes the contract in his own name, he will himself be personally responsible for the fulfilment of the contract." *Addison on Contracts*, 7th ed. 392; cf. *Chitty on Contracts*, 11th ed. 210. The leading authority on this point is the case of *Franklyn vs. Lamond*, 4 C. B. 637, where WILDE, C.J., said:—"I apprehend it to be very old law, that an auctioneer who sells without at the time of sale disclosing the name of his principal, contracts personally. This is the simple case of parties who have sold as principals turning round afterwards and saying that they were merely agents in the transaction." And COLTMAN, J., in concurring, remarked that on this point the case of *Hanson vs. Roberdeau* was conclusive. That was a case in which Lord KENYON ruled that where an auctioneer does not disclose the name of his principal *at the time of the sale*, he is personally liable to an action for damages for not completing the contract (Peake, N. P. C. 163, 4 C. B. 642, n.). Among the modern cases in which this principle as to the obligations and the correlative rights of auctioneers in these circumstances has been affirmed, it will be sufficient for me to cite those of *Fisher vs. Marsh*, 34 L. J. Q. B. (*per* BLACKBURN, J., at p. 179), and *Woolfe vs. Horne*, 2 Q. B. D. 355.

The liability of the auctioneer therefore, in a case like the present, being that of a principal, what is the extent of the principal's liability? No doubt according to the general principles of the English law a vendor of goods does not warrant title; though this principle is subject to many exceptions, which the tendency of modern decisions is apparently to extend; see *e.g.*, *Williams's Law of Personal Property*, 9th ed. p. 441, and cases there cited. But the rule of both the ancient and modern civil law is different, and a contract of sale of movables implies a warranty of title. This will sufficiently appear on reference to the note in *Chitty on Contracts* at p. 414, which was cited by Mr. *Levey* on behalf of the appellant, and which shews, by reference to *Domat*, to the *Code Civil*, and to *Bell's Principles*, that by the civil law, both ancient and modern, by the law of Scot-

1884.
Jan. 25.
Feb. 15.

Warrington vs.
Vigne & Rorke.

1884.
Jan. 25.
Feb. 15.

Warrington vs.
Vigne & Rorke.

land, and also, as the learned author adds, to some extent by the law of the United States of America, there is in a contract of sale either an implied warranty of title, or an implied indemnity against eviction and its consequences. The same doctrine will be found clearly laid down in *Pothier on Sale*, p. 50, sect. 83, and in *Grotius*, iii. 14, 1, where "purchase and sale" is defined as "a contract whereby one person binds himself to give and warrant the ownership in a certain thing and the other to pay a certain price in money"; cf. also iii. 14, 6, where the subject of warranty and eviction is discussed, with references to the Digest; and iii. 15, 4, on the consequences of sale and the obligations of the seller (*Maasdorp's* ed., pp. 360-2, 377). The only other authority to which it may be useful to refer is one which I am rather surprised was not cited in the argument—possibly because learned counsel were not aware that the meagre supply of Roman-Dutch authorities in our library has recently been considerably augmented—namely, *Matthæus De Auctionibus*. *Matthæus* says: "Quod si alienam vendiderit, eaque evicta fuerit, videndum an actio evictionis emptori detur, et adversus quem competet? Si voluntaria sit auctio, venditor non minus de evictione tenetur, ac si citra auctionem vendidisset, nisi publicè denuntiaverit, nolle se de evictione teneri: quod vernaculè dicimus, *met de voeten stooten*: aut si proscripserit venditurum se, *quicquid iuris in eo fundo habet*: his enim verbis inest tacitè illud: nolle se de evictione teneri. Quae tamen denunciatio hactenus auctionanti prodest, ut ne in id quod interest convenire possit; ceterum pretium nihilominus restituere tenetur dolumque malum præstare" (I. xiv. 5). As to the sense of the verb *auctionor* and the word *auctionanti* in the above passage, it clearly means not "to sell as auctioneer," but "to sell by means of an auctioneer," the auctioneer apparently in private as well as public sales being designated as *præco*. That this is the meaning of the verb will sufficiently appear from the following passage, in which the duty of the auctioneer to pay over the purchase-price to the vendor is discussed: "Si præsentì pecunia, eodem die, vel longissimum sequente, exacta pretia auctionanti solvere debet (I. xv. 10)." The *præcones* were public officers and also

enjoyed the monopoly of conducting private sales by auction. In the previously quoted passage Matthæus goes on to say: "Præco vero civitatis, qui prædicat involuntariis auctionibus pretiumque sufficit, emptori quidem de evictione non tenetur, si tamen rem furtivam temere vendiderit æstimationem domino præstare compellitur." But this must be understood to apply only to cases where the *auctionans*, the *dominus*, is known and the *emptor* has his remedy against him; in such cases the exemption from liability of the auctioneer had at an early time become proverbial, as we find from a phrase of Cicero, in his oration *pro Quinctio*: "Quod promississet, non plus sua referre, quam si, cum auctionem venderet, domini iussu quippiam promississet"—a passage in itself sufficient to dispose of the quite unfounded doubt which Mr. *Forster* in his argument incidently cast on the antiquity of the profession of auctioneer. When, as in the present case, the auctioneer sells without disclosing the name of the *dominus*, his liability is that of the *auctionans*, as laid down by *Matthæus*, and of any ordinary vendor of goods, according to the principles of our law, as laid down in the authorities I have already cited. On these grounds I am of opinion that the judgment of the Magistrate in this case must be reversed, and judgment entered for the appellant for the amount claimed, with costs both here and in the Court below.

[Appellant's Attorney, COGHLAN.
Respondents' Attorneys, GRAHAM & GILBERT.]

RAMSAMMY vs. VINCOT SAM.

Magistrate's discretion.—Costs.

Where a Magistrate gave judgment substantially in favour of a plaintiff in an action of debt, but ordered the plaintiff to pay the costs of the action on the ground that his motives for suing the defendant were unsatisfactory: Held, on appeal, that the Magistrate had not exercised a judicial discretion, and that the judgment as to costs must be reversed.

1884.
Jan. 25.
Feb. 15.

Warrington vs.
Vigne & Rorke.

1884.
Jan. 25.
—
Ramsammy vs.
Vinoot Sam.

Appeal from the Assistant Magistrate of Kimberley. The appellant, the plaintiff in the Court below, claimed £47 for wages; the defendant pleaded a set-off and counter-claim to the amount of £57 odd for goods sold and delivered. The Magistrate gave judgment for the plaintiff in convention for £47, and for the defendant, as plaintiff in reconvention, for £13, and ordered the plaintiff in convention to pay the costs of suit, expressing his opinion, in a written judgment which was annexed to the record, "that this case has been brought into Court not so much for the purpose of recovering the amount sued for, but more owing to some ill-feeling between the parties." The plaintiff appealed.

Lange, for the appellant, having stated that the appeal was solely on the question of costs,

The Court (LAURENCE, J.) called on

Davison, for the respondent, who submitted that the Court would be very reluctant to interfere with the discretion of the Magistrate on the question of costs. The Magistrate appeared to have regarded the action as vexatious, and one of a kind which should not be encouraged.

LAURENCE, J., referred to *Van der Burg vs. Gebhard*, 3 Menz. 407, *Bennet and Webster vs. Coetzee*, 1 Juta, 285, and *Kissten vs. Van Noorden*, Buch. 1879, 232. Here the judgment of the Magistrate was substantially in the plaintiff's favour, and it was not within his judicial discretion to compel him to pay the costs because he disapproved of what he conceived to be the plaintiff's motives in suing for a debt which he had found to be due to him. The appeal must therefore be sustained, and the respondent ordered to pay the costs, both here and in the Court below.

[Appellant's Attorney, BEEVOR.
Respondent's Attorney, COGHLAN.]

QUEEN vs. FORBES.

Ordinance 19, 1880, §§ 5, 6, 11.—Liability of trustee as transferee of liquor licence.—Exceptions and provisoes in penal statutes.—Burden of proof.

The trustee of an insolvent estate obtained transfer to himself of a liquor licence held by the insolvent, and appointed a manager who contravened the liquor laws. The trustee having been convicted for this contravention, the conviction was sustained on appeal.

Where one section of an Act makes it an offence to sell liquor in prohibited hours, and a subsequent section allows the sale within such hours to bonâ fide travellers, the burden of proving that the purchaser in any particular case was a bonâ fide traveller lies on the defence, and it is unnecessary for the qualification of the purchaser to be negatived in the summons.

This was an appeal from the Police Magistrate of Kimberley, by whom, on the 10th of November, 1883, the appellant had been convicted of contravening sect. 5 of Ord. 19 of 1880 (Griqualand West), by selling, "either by himself or some other person then being on the licensed premises," certain intoxicating liquors after hours to one Curry, he not being licensed to deal in such liquors after 9 P.M., as by law required. At the trial it was objected, on behalf of the accused, that it was competent, under sect. 6 of the above Ordinance, for Licensing Boards "to grant the following privileges to licensed retail dealers in intoxicating liquors: (a) *Week-day Privileges*, which shall be taken to mean the permission to a *bonâ fide* hotel or boarding-house keeper to supply *bonâ fide* travellers or regular boarders with such liquors as they may call for before or after the regular hours of opening and closing, as fixed in the last preceding section, &c.," and that it was not alleged in the charge either that the accused did not possess such privileges, or, if he did, that Curry was not a *bonâ fide* traveller. The

1884.
Jan. 25.
—
Queen vs.
Forbes.

1884.
Jan. 25.
Queen vs.
Forbes.

Acting Clerk of the Peace then applied for an amendment in the charge by inserting the words “not being a *bonâ fide* traveller or regular boarder” after the word Curry. This amendment was objected to on behalf of the accused, but allowed by the Magistrate. It was then proved that a licence for the premises in question, with “week-day privileges,” had been issued to one Clarke, and had been transferred to the accused in his capacity as trustee of Clarke’s insolvent estate, and he carried on the business for the benefit of the estate, through a manager, one Crawford, to whom he had given a power of attorney to act under his licence, which was put in. The sale by Crawford, between 10 and 11 P.M., of liquor to Curry, a detective, was then proved, and that Curry was neither a boarder nor *bonâ fide* traveller, and that no question was asked by Crawford on the subject. The accused was convicted and sentenced to pay a fine of £5 1s., or seven days imprisonment, against which conviction and sentence he appealed.

Davison, for the appellant :—Sect. 11 of the Ordinance provides that “the holder of any retail licence shall be deemed and taken to be responsible for every sale of intoxicating liquors on his premises, contrary to the provisions of Ord. No. 16 of 1879, or of this Ordinance, until the contrary appears.” When it is proved that the holder is such in his capacity as trustee of an insolvent estate, “the contrary appears” within the meaning of this section. It could never have been intended that such persons, who had no personal interest in the business, and who might have no funds in hand with which to pay a fine, should be held criminally responsible for any contravention of the liquor laws which might take place. There was not sufficient evidence that the purchaser was not a *bonâ fide* traveller. Moreover, the amendment on this point really changed the nature of the offence charged, and thus prejudiced the prisoner.

Hoskyns, C.P., in support of the conviction, was called on only on the point as to the amendment in the summons, which he contended could not possibly have prejudiced the prisoner. As to the suggestion that the purchaser might

have been a *boná fide* traveller, it was the duty of the vendor to ascertain this before supplying him.

Davison replied.

1884.
Jan. 25.
Queen vs.
Forbes.

LAURENCE, J.:—With regard to the first point, which is the main contention on behalf of the appellant, I cannot assent to the argument that, because the holder of a licence to sell liquors holds it in his capacity as trustee in an insolvent estate, his position and responsibility, in the event of a contravention of the law, are in any way different from the position and responsibility of a holder in his private capacity. The law provides for the transfer of subsisting licences to trustees in such circumstances, but there is nothing in the Ordinances to shew that when this takes place the transferee is free from all criminal liability for the manner in which the licensed house is conducted, or that in such cases “the contrary appears” under sect. 11, as argued on behalf of the appellant. As to the amendment which was made in the charge, I have felt more doubt, and I think Magistrates should be very cautious in allowing amendments to be introduced in criminal charges. The amendment in the present case seems to me to have been unnecessary, as the exception with regard to the holders of “week-day privileges” and *boná fide* travellers was contained, not in the section which the accused was charged with contravening, but in a subsequent section; and in that case the principle is that it is not for the Crown to traverse in the indictment and disprove by the evidence the falling of the case within the excepted category—as it would be if the exception were embodied in the section constituting the offence—but it is for the defence to shew, if they can, that the case falls within the exception laid down in the subsequent clause, and not within the rule laid down in the clause before the Court. It is therefore impossible to contend that the accused was prejudiced by an amendment in the charge of which the effect was simply to throw upon the Crown the burden of proof on a point where it would otherwise have been incumbent on the defence to establish the contrary. There was quite sufficient proof adduced that the purchaser was not a

1884.
Jan. 25.
Queen vs.
Forbes.

bonâ fide traveller; and the appeal must therefore be dismissed and the conviction sustained (a).

[Appellant's Attorney, COGHLAN.]

(a) [On this principle in the construction of statutes, cf. *R. vs. Jukes*, 8 T. R. 543; *Thibault vs. Gibson*, 12 M. & W. 88; *Taylor vs. Humphries*, 17 C. B. N. S. 539; *Wilberforce on Statutes*, 304, 305. In *R. vs. Jukes*, Lord KENYON, C.J., referred to 2 *Hawkins*, c. 25, § 113, and said: "That this conviction could not be supported, because the information did not negative the exception introduced in the clause enacting the offence, viz. that the buttons had been exposed to sale in this instance upon the pattern cards. In like manner as in convictions on the game laws, it had always been deemed necessary to negative in the information the defendant's qualifications to kill game; that the only cases where this was not necessary to be done were, where the exception was introduced in a subsequent clause; and then it must come by way of defence on the part of the defendant." Similarly, in *Thibault vs. Gibson*, Lord ABINGER, C.B., said: "I believe it is a well-established principle that, in all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause which gives the penalty, exempting certain cases from its operation, the declaration or information must shew that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act, it is not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as a ground of defence. The same rule applies with increased force and efficacy to the case where penalties are given by one statute, and particular cases are, by a subsequent statute, exempted from its operation." And PARKE, B., said: "I am of the same opinion. The rule of pleading which has been adverted to is thus stated in 1 Wms. Saund. 262, a: 'Wherever a statute inflicts a penalty for an offence created by it, but there is an exception in the enacting clause of persons under particular circumstances, it is necessary to state in the information that the defendant is not within any of the exceptions. And it seems immaterial whether the exception be in the same section, or in a preceding Act of Parliament, referred to by the enacting clause. But where the exception is contained in a proviso in a subsequent section or Act of Parliament, it is matter for defence; and therefore it is not necessary to state in the information that the defendant is not within such proviso.' In all cases of exception, where it comes by way of proviso in a subsequent section, the exception must be noticed by the party who relies on it." *Taylor vs. Humphries* was a decision on 11 & 12 Vict. c. 49, which imposed a penalty on licensed victuallers selling liquor on Sunday before a certain hour in the afternoon "except to travellers." It was held that, as the exception was contained within the section of the Act which created the offence, the *onus* of shewing that the persons supplied with refreshment were not within it was on the informer. The same construction was put upon similar words in 2 & 3 Vict. c. 47 in the case of *Davis vs. Scrace*, L. R. 4 C. P. 172.—ED.]

KENNEDY, N.O., vs. HAARHOFF.

Principal and surety.—Executor's accounts.—Obligation of surety and co-principal debtor.—Provisional sentence.

D. H. had bound himself, nearly eight years before the present proceedings, as surety and co-principal debtor, for the due fulfilment by J. H. of his duties as executor dative. J. H. had left the country and had filed no account as executor, and was believed to be dead. Provisional sentence was granted against D. H. on the bond.

Provisional sentence was claimed by the plaintiff, in his capacity as acting Master of the High Court, by virtue of a security bond for £200, wherein one James Hall, executor dative to the estate of Charles Lennox Christie, had bound himself to the Master of the High Court in the above sum as a security for the due and faithful administration of the said estate by him; and wherein Daniel Johannes Haarhoff had interposed and bound himself, as a surety *in solidum* and joint principal debtor, to the said Master for the sum of £200, renouncing the benefit of the exceptions *ordinis, divisionis, et excussionis*, the said James Hall engaging to indemnify and hold harmless the said surety from all damages he might sustain through becoming surety. The condition of the obligation was that if James Hall shall duly and faithfully administer the said estate and render a proper account of his administration, then this obligation shall be void and of no effect; otherwise it shall be and remain of full force and effect. The bond was dated 25th February, 1876, and was executed by James Hall and the defendant D. J. Haarhoff. It was alleged in the summons that the above condition had not been complied with by the defendant or the said James Hall.

Affidavits on behalf of the defendant were produced, alleging that the predecessors in office of the plaintiff had taken no steps in the present matter from the date of the bond until the 9th of May last past, when a letter was written to the defendant informing him that accounts had

1884.
Feb. 18.
—
Kennedy, N.O.,
vs. Haarhoff.

1884.
Feb. 18.
Kennedy, N.O.
vs. Haarhoff.

not been filed, and that proceedings would be taken to enforce payment of the amount secured by the bond; that the defendant thereupon replied, taxing the Master's office with neglect in not giving him earlier notice of the executor's non-compliance with the conditions of the bond; he added that owing to the length of time which had been allowed to elapse he no longer considered himself liable, and that he believed that Hall, the executor, had died in England. His affidavits further alleged that he had held a conversation with the previous Master on the subject, in which that officer had expressed himself satisfied that the estate had been properly administered, and that the failure to file the accounts was due to the severe illness of the executor. On behalf of the plaintiff affidavits were produced shewing that the executor Hall, shortly after his appointment, had become very ill and had left the country; that notices had been sent to him through his representative, Mr. Craven, at Kimberley, calling upon him to file the account, and that Craven had, in answer to one of these notices, called at the Master's office and explained why it was impossible to file the accounts; further, that it had since transpired that a sum of about £130, which the executor ought to have handed over to the heirs of the said Christie, had never reached them.

Forster, for the defendant:—The facts are that the bond was entered into early in 1876, shortly after which date the executor Hall became ill and incapacitated, and Mr. Craven was accepted by the Master as a sort of assumed executor in his place. The surety, the present defendant, is not responsible for the acts or omissions of Craven. The Master took no steps for the removal of the executor when he became incapacitated, as he ought to have done under the provisions of section 21 of the Wills and Intestacy Ordinance of 1844; and when it was known that he had died the Master ought to have proceeded under the 25th section of that Ordinance. Instead of taking this course, the Master allowed Craven to act, and did this behind the back of the surety. The ordinary rules of suretyship would thus apply, and the new arrangement without his consent

would discharge the surety. Moreover the surety was discharged because the principal had not been excused.

1884.
Feb. 18.
Kennedy, N.O.,
vs. Haarhoff.

LAURENCE, J.:—The obligation in this case is that of a joint principal debtor, and the benefit of the exception of excussion is renounced.

Forster:—The Master, instead of taking the steps provided by the Ordinance, has released the executor and accepted Mr. Craven in his stead.

JONES, J.:—Is not the executor liable until he is removed? And can the Master accept a substitute?

Forster:—The executor is liable, and the Master has no such power.

JONES, J.:—Then how can the Court relieve the surety because of an act of the Master which was *ultra vires*?

Forster:—The Master released the surety by making this arrangement to his prejudice without his knowledge.

Per Curiam:—Is the amount stipulated in the bond of the nature of a penalty or liquidated damages?

Forster:—It is admitted that the authorities are against the defendant on that point (*Fisher's Digest*, vol. i. col. 1353–1357, “Bond”).

Hoskyns, C.P., for the plaintiff, argued that the law of principal and surety had been too baldly stated. Nothing had happened to release the surety: *Fisher's Dig.* vol. iv. col. 8270–1; *Eyre vs. Everett*, 1 Russ. 381; *McTaggart vs. Watson*, 10 Bligh, 618; *Madden vs. McMuller*, 13 Irish C. L. R. 315; *Trent Navigation Co. vs. Harley*, 10 East, 34; *Dawson vs. Lawes*, 23 L. J. Eq. 434, per WOOD, V.C.; *Strongy vs. Foster*, 25 L. J. C. P. 106.

The COURT stopped the *Crown Prosecutor* in his argument.

BUCHANAN, J.P.:—The defendant in this case is liable not only as surety, but also as joint principal debtor, and

1884.
Feb. 18.
—
Kennedy, N.O.,
vs. Haarkoff.

therefore the arguments urged on his behalf on the ground of his suretyship alone are not sufficient. The obligation of the principal was that Hall should duly discharge his duties as executor and file proper accounts. This he has failed to do, and therefore a condition of the bond has been broken. There seem to have been irregularities and delay in the Master's office, but no fraudulent connivance has been proved, and certainly none on the part of the present occupant of the office. Therefore on the authorities quoted nothing has happened to discharge the principal, or the defendant as surety and joint principal debtor, from his obligation. In strict law the defendant is liable, and the Court cannot consider the undoubted hardship of the case. Provisional sentence must therefore be granted as prayed, with costs.

JONES and LAURENCE, JJ., concurred.

[Plaintiff's Attorneys, GRAHAM & GILBERT.]
[Defendant's Attorneys, HAARKOFF BROS.]

DELL vs. BAWDEN.

Provisional sentence.—Accommodation note.—Nominal holder.

Where B. made an accommodation note in favour of S., who endorsed it in blank and passed it to a bank as collateral security for his liability, provisional sentence was granted against B. at the suit of a plaintiff who was a nominal holder on behalf of the bank, in the absence of any proof that the plaintiff was not duly authorised to sue on the note.

1884.
Feb. 18.
—
Dell vs. Bawden.

Hopley prayed for provisional sentence on a promissory note for £950 made by the defendant in favour of one Slater on the 27th November, 1882, due on the 27th January, 1883, and by Slater endorsed in blank, of which note the summons alleged the plaintiff to be the legal holder. Affidavits for the defendant alleged that the note was made for the

accommodation of Slater to meet liabilities of his to the Du Toit's Pan branch of the Standard Bank, and that the manager of that branch, when he received the note from Slater, had knowledge of the fact that the defendant had received no consideration for it; the defendant further alleged that the present plaintiff was not the holder for value of the note, and that he had given no consideration whatever for it. The plaintiff's affidavit set forth that he was the manager of the Kimberley branch of the Standard Bank; that the Du Toit's Pan branch had been closed in September 1883, and all its assets taken over by the Kimberley branch; that it appeared from the books of the Du Toit's Pan branch that the defendant had in July 1883 pledged certain shares as security for the payment of the note; that the plaintiff was the *bonâ fide* holder for valuable consideration of the said note; that the defendant had been frequently pressed by the Bank for payment, and had never denied his liability.

1884.
Feb. 18.
Dell vs. Bawden

Forster, for the defendant, admitted that if the Standard Bank, or Dell in his capacity as manager of that Bank, were suing on this note the defendant would have no defence; but contended that Dell individually could not recover, he not being a holder for valuable consideration. Dell knew that this was an accommodation note, because the Bank knew it, and Dell is now managing the affairs of the Du Toit's Pan branch, where the contract was made. The Bank, the real holder of this note, must be taken to have passed it to Dell without consideration, and Dell suing individually can recover only what he paid for the note; *Byles on Bills*, 13th ed. p. 130. The Court should not think of Dell as the manager of the Bank, but merely as a plaintiff who had acquired this accommodation note with notice of its nature and without giving any consideration for it, and who had therefore taken it with all its equities, so that the defendant can now set up the non-receipt of value against the "holder."

Hopley, contra:—The note being endorsed in blank passes by delivery with intention to transfer. If the Bank had made a gift of the note to Dell he would have as much

1884.
Feb. 18.
—
Dell vs. Bawden.

right to recover on it as the donor had, and here it is admitted that the Bank would have had every right to sue the defendant. When a plaintiff comes into Court in possession of a note, the Court will presume that he has a right to it and holds it for valuable consideration, and here the plaintiff swears that he is the *bonâ fide* holder for value. It is customary to sue by nominal holders, who have the same rights as those from whom they receive the note for the purposes of the suit. The case of *Findlay vs. Hains*, which had been referred to by Mr. Justice LAURENCE, and which was reported concisely in 1 *Cape Law Journal*, 41, is exactly in point, and as far as can be gathered from the short note of the case in the *Journal*, the same defence was there raised. To make this defence good it is necessary for the defendant to prove absence of authority from the Bank to the holder to sue.

BUCHANAN, J.P.:—It is admitted that if the Bank had sued there would have been no ground of defence, as the Bank had given consideration for the note; but it is said that Dell is plaintiff as “holder” without consideration, and that he cannot recover. If the consideration was originally given, the Bank can depute the right to sue to any one. This is the practice in all the Colonial Courts, where nominal holders are frequently plaintiffs. As far as can be gathered from the succinct note of the case, *Findlay vs. Hains*, recently decided in the Eastern Districts Court, seems to be in point, and that decision governs the present case. Provisional sentence must therefore be granted, with costs.

JONES, J.:—The defendant can set up no equities against the transferor of this note, and therefore he has none against the transferee. I therefore concur in thinking that provisional sentence should be given.

LAURENCE, J., concurred.

[Plaintiff's Attorneys, GRAHAM & GILBERT.]
[Defendant's Attorney, DEWHURST.]

DIERING & CO. *vs.* KEEFER.

Act 20, 1856, sect. 8.—Ordinance 13, 1874, Griqualand West, sect. 3.—Magistrate's jurisdiction.—Balance of account.

Where the claim of a plaintiff has been reduced before action brought by a cash payment to an amount within the jurisdiction of the Resident Magistrate, he should sue for the balance in the Magistrate's Court, and if he sues in the High Court only Magistrate's Court costs will be allowed.

Levey prayed for judgment in default of appearance under Rule of Court 329 (d), in terms of a summons wherein the plaintiff claimed £156 10s. 9d. for wines, &c., supplied to the defendant, less the sum of £106 10s. 9d. paid on account, together with interest *a tempore petitionis* and costs of suit.

1884.
Feb. 18.
—
Diering & Co.
vs. Keefer.

The COURT pointed out that the claim was for £50, which was within the Magistrate's jurisdiction; and the interest, being claimed only *a tempore petitionis*, did not take the matter out of his jurisdiction.

Levey submitted that the defendant might have opened up the whole account and disputed items, or denied that the payment made was on this account. He quoted *Awards and Another v. Rhodes*, 22 L. J. Exch. 106.

Forster and *Hopley*, as *amici curiæ*, referred to *Van der Walt vs. Hawkins*, 3 Buch. E. D. C. 27; *Beer v. Chiappini*, 3 Buch. E. D. C. 131, and *Charsley v. Horsley* (E. D. C., not reported).

Levey:—The defendant might have taken exception to the summons in the Magistrate's Court, or he might have raised a dispute as to the amount due, and so thrown the plaintiff out in the Magistrate's Court, and saddled him with costs.

The COURT gave judgment as prayed, but with Magistrate's Court costs only. By sect. 3 of Ord. 13, 1874, Griqualand West, amending, so far as this Territory was concerned, sect. 8 of Act 20 of 1856, the Magistrate had jurisdiction in

1884.
Feb. 18.
—
Diering & Co.
vs. Keefer.

illiquid cases up to £50; and where a claim, originally exceeding that amount, had been reduced by a cash payment to £50, and there was nothing to shew that the whole account, or the appropriation of the payment made, was in dispute, the claim for the balance should be brought in the Court of the Resident Magistrate, who had jurisdiction to entertain it.

[Plaintiff's Attorney, RHODES.]

STANDARD BANK vs. BIDEN'S TRUSTEE AND OTHERS.

Ord. 6, 1843, §§ 8, 30, 44, 58, 111.—Liquidation and contribution account.—Secured creditors.—Liability of creditors to contribute to deficiency incurred before filing of their proofs.—Remuneration of trustee.

Creditors who have proved on an insolvent estate in which there is a contribution account are liable to contribute although the expenses were incurred before they filed their proofs.

Where a secured creditor has valued and retained his securities with the consent of the trustee, the latter is not entitled to charge commission on the value of such securities.

Where the Master had allowed the trustee certain special remuneration, in addition to his commission, on account of his loss of time and trouble in conducting a lawsuit and other matters connected with the administration, the Court, in the absence of satisfactory evidence of exceptional circumstances to justify such special remuneration, disallowed the charge.

1884.
Feb. 18.
—
Standard Bank
vs. Biden's Trustee
and Others.

The applicant Bank, a creditor in the insolvent estate of Biden, had taken certain objections to the account filed by the trustee, and the present application was made under the 111th section of the Insolvent Ordinance to have the account amended accordingly. It appeared from the affidavits that after the respondent, Mr. G. Richards, had accepted his trust

an action was instituted in the High Court of Griqualand against him in his capacity as trustee to compel him to give up a valuable asset claimed by the estate. At that time nine creditors only, including the applicant Bank, had proved their claims on the estate. The trustee sought directions from these creditors and, acting on their instructions, defended the action and got judgment in his favour. This judgment was, however, appealed against and reversed by the Court of Appeal (BARRY, J.P., and BUCHANAN, J.P., dissenting), with costs of the appeal and of the action in the Court below. The result of this decision was that the costs exceeded the assets of the estate by £999. After this state of things had been ascertained seven other creditors proved on the estate. In the account now objected to the trustee had ranked the nine creditors who had originally proved their claims as contributories to make up the deficiency, and had not included the seven who had subsequently proved. These seven creditors were respondents in the present application, but at the hearing service of notice on three only was shewn, the other affidavits having been mislaid. The trustee had in the account charged a sum of 50 guineas as extra remuneration to himself for work done in defending the action in this Court and on appeal, this duty having, it was alleged, entailed a large amount of arduous labour, and also for work done in trying to establish a claim of the estate to another asset. The applicant Bank had originally proved for £9645 11s. 6d., for part of which they held securities. The trustee called upon the Bank to value these securities, and the manager thereupon valued them at £2480, at which price the trustee assigned them to the Bank, which was then ranked as a concurrent creditor for the balance. In the account the trustee, however, charged the Bank £124, being commission at the rate of 5 *per cent.* on the sum of £2480. The present application was to amend the account: (1) By ranking the seven creditors as contributories for the deficiency in the estate; (2) By striking out the sum of 50 guineas; (3) By striking out the charge of £124 as commission. For the trustee it was alleged on affidavit, with regard to the sum of 50 guineas, that he had given due notice of the taxation by the Master of the Court to the ap-

1884.
Feb. 18.

Standard Bank
vs. Biden's Trust-
tee and Others.

1884.
Feb. 18.

Standard Bank
vs. Biden's Trust-
tee and Others.

plicant's attorneys, who however had not appeared at the taxation, when the Master, after duly considering the matter, had allowed the charge as fair and reasonable, under the provisions of sect. 44 of the Insolvent Ordinance.

Hoskyns, C.P. (with him *Hopley*), for the applicant, said that it was difficult to see on what grounds the seven creditors who had proved after the decision of the Appeal Court should be exempted from paying their share of the deficiency. This was not a case contemplated by the proviso in section 8 of the Insolvent Ordinance. If the Appeal Court had given its decision in favour of the estate, without doubt these creditors, though they proved after the event, would have been entitled to share in the advantage. [The COURT here stopped the *Crown Prosecutor* on this point.] The amount of 50 guineas is charged as *bonus* for extra work done by the trustee in connection with the lawsuit, and in trying to establish a claim for the estate to a share in the Vaal River estate, being work independent of the realisation of assets.

JONES, J.:—It is claimed by virtue of the Master's taxation as authorised by the 44th section of the Ordinance.

Hoskyns, C.P.:—The mere fact of certain extra work being done does not warrant the granting of special compensation to the trustee. This was all work in connection with the trust, and the Master ought not to have allowed the charge. On the third point—viz., the £124 charged as commission—he argued that the trustee had done nothing at all to earn the amount. He had simply expressed himself satisfied with the valuation of the secured creditor, had assigned the securities to that creditor, and had left the trouble and risk of realising the securities to him. [The COURT stopped the argument on this point also.]

Forster, for the respondents, urged that, whatever a creditor's responsibilities might be after he had proved, both the Insolvent Ordinance and common law would exempt him from responsibility for the action of his co-creditors in

administering the estate at a time when he had nothing to do with it. The proper course is for a trustee to consult creditors before engaging in law expenses. If he does this, then it follows that those who instruct him are responsible. In the present case the trustee was empowered to defend the action by the creditors who had then proved—that is, virtually, by the present applicant, who had the largest vote in the matter. Therefore those creditors alone should pay for the result. The creditors who had proved subsequently would certainly have abstained from doing so had they thought it possible that they should be made liable for the deficiency. The words at the end of section 8 of the Insolvent Ordinance, “and reserving to such trustee recourse against the said estate and against such creditors thereof or others as may on other grounds be liable to such recourse,” included a case like the present where expenses had been incurred in litigation at the instigation of certain creditors who hoped to be benefited by the result. The trustee’s recourse was against them alone. The question was one of agency, and the trustee was not the agent of those creditors who were in no way concerned in the administration of the estate at the time of the litigation.

1884.
Feb. 18.
—
Standard Bank
vs. Biden’s Trust-
tee and Others.

JONES, J.:—The trustee can bring and defend actions on behalf of the estate without authority from the creditors. The Ordinance does not regard his trust as a matter of agency.

LAURENCE, J.:—Suppose a majority of creditors who have proved authorise an action, while the minority protest; the minority would be liable for their share of the costs if the action proved unsuccessful. Where then is the agency?

Forster:—The creditors, now respondents, were not before the Court in the action in which the costs were incurred. How can the order of the Court as to costs affect them in their absence? By subsequent proof on the estate they do not connect themselves with the costs incurred in their absence; nor are they so connected with the trustee as to be bound by an order as to costs given against him. Upon the

1884.
Feb. 18.

Standard Bank
vs. Biden's Trust-
tee and Others.

second point he contended that the present objection was wrongly taken. The item of 50 guineas had been allowed by the Master on taxation, and the proper course for the applicant would have been to apply for a review of the taxation. If it were held that this is a review of the taxation he urged that the present objector after due notice had not appeared before the Master to object, and that the Master in the exercise of his discretion had allowed the item. The amount was not an excessive allowance to the trustee for conducting a difficult and intricate lawsuit, and for the other complicated matters which the administration had involved. If the charge were disallowed the trustee would obtain only about £15 by way of commission, which was an entirely inadequate compensation for his loss of time and trouble. On the third point he contended that it was incorrect to say that the trustee had not done any work in connection with these securities. He had in fact realised them. They vested in him as soon as he was appointed, and though he never had physical possession of them, yet he disposed of them to the secured creditor, and so realised them. If the applicant's contention were correct trustees would suffer hardship in many instances, for in many estates nearly all the assets were pledged. The trustee has to exercise his judgment as to whether the secured creditor is putting a fair valuation on the securities, and he has to act accordingly. In some estates, the assets being all pledged, he would get no commission at all. But a trustee's remuneration is not necessarily by way of commission or percentage. Section 44 of the Ordinance laid down that trustees were entitled to a reasonable compensation for their care and diligence; and here the trustee has done a large amount of extra work in consideration of which he applied to the Master for the assessment of a special charge.

Hoskyns, C.P., was called upon to reply on the second point only. He admitted that, in exceptional circumstances, a special remuneration might be allowed to a trustee, but very strong reasons must be shewn. Here there was nothing except a letter from the trustee to the Master, saying that he had had considerable trouble in the lawsuit and in the matter of the Vaal River estate. That was not sufficient, and

the Master, in allowing the item, had not exercised his discretion reasonably. The trustee had merely done his duty in defending the action, and the conduct of the case had rested with his legal advisers. A trustee ought not to be rewarded by special remuneration for merely doing his duty in bringing or defending an action for the benefit of the estate. The Supreme Court had hitherto held that a strict rule must be laid down in the matter of trustee's charges: *Re Denison*, Buch. 1868, 5.

1884
Feb. 18.

Standard Bank
vs. Biden's Trust-
tee and Others.

BUCHANAN, J.P.:—I am of opinion that the objections taken by the applicant to this account must be allowed, but as there appears to be some doubt owing to the mislaying, as it is said, of certain affidavits, whether four of the seven creditors now respondents have been served, our judgment will not affect them at present. With regard to the first objection, it seems clear, after looking at the 8th section of the Ordinance, that all creditors who have proved are liable for a deficiency whether their proof upon the estate has been made before or after the expenses which caused the deficiency were incurred. I take it that those who proved after the deficiency in the present estate had been ascertained did so with some object of gain. If the decision of the Court of Appeal had been reversed, they would have shared in the asset which the estate would have gained, and they cannot “blow hot and cold.” They took their chance of gain, and ran the risk of a loss, and they must therefore contribute to the expenses of the estate. Upon the second objection we have very little to guide us. The Courts have laid down a rigid rule in distinguishing between commission on movables and that on immovables, as is shewn in *Re Denison*, and no case has been cited where special remuneration has been allowed for extra work done by a trustee. Are there, then, in this case special circumstances to warrant a special assessment by the Master under section 44? There is no affidavit by the Master, and nothing to shew whether he exercised his discretion reasonably. Even the trustee's letter to the Master asking for special remuneration does not make the ground of his claim clear. The item must therefore be struck out. As to the third objection, the assets on which

1824.
Feb. 18.

Standard Bank
vs. Biden's Trust-
tee and Others.

the trustee claims commission were never in his hands. When a creditor holds security for his debt, he keeps possession of it ; and it is only after he has put a value upon it with which the trustee is not satisfied that the trustee can take an assignment of the security for the benefit of the estate. The trustee has in this case done practically no work as regards these securities. I may remark that I am in a position to state, after due inquiry, that it is not the practice in the Supreme Court to allow any commission on the value of securities so left in the creditor's hands.

JONES, J.:—I concur in the remarks which the Judge President has made with regard to the first and third objections ; but I would go further than he has done in stating my reasons for allowing the second. I think that a trustee takes his office with certain risks. Sometimes he pockets heavy fees for slight work, and sometimes he has a great deal of labour for very small remuneration. It happens here that the latter is the case. The 58th section of the Ordinance empowers a trustee to take legal advice and to institute and defend actions. It is part of his duty (which he must count upon when he takes office) to do this ; and I have yet to learn that a trustee is entitled to any remuneration for instructing his attorneys in an action.

LAURENCE, J.:—I think it is perfectly clear that if a creditor proves on an insolvent estate after a liability has been incurred by the trustee, he is liable for his share of that expense. If there be a surplus in the estate he will share in it, and if there be a deficiency, he must contribute towards making it good. This question must be decided irrespective of agency. What the object of the creditors who proved after the decision of the Appeal Court was I cannot say ; but, as they did prove, they are liable equally with the other creditors. I agree with what has fallen from the Judge President with regard to the third objection. As to the second objection, I think it would have been better if the applicant had attended the taxation. I confess that I feel somewhat reluctant to interfere with the Master's decision on such a point. No doubt some extra work was

done in this estate; but on the whole I cannot see, on the evidence before us, that any special circumstances were indicated to the Master to justify him in allowing this special charge. I agree therefore that all the objections must be allowed.

1884.
Feb. 18.
Standard Bank
vs. Biden's Trust-
tee and Others.

It was therefore ordered that the three creditors who had been served with notice of the application should be added to the list of contributories, and that the items of 50 guineas and £124 should be disallowed. Costs to come out of the estate.

Postea (February 21), the missing affidavits of service having been produced, the remaining four respondents were ordered to be added to the list of contributories.

[Applicant's Attorneys, GRAHAM & GILBERT]
[Respondent's Attorneys, HAARHOFF BROS.]

ROTHSCHILD AND OTHERS vs. GREENSTREET.

Service of summons in Magistrate's Court.—Liability of individual partners for debt of firm.—Act 20, 1856, Schedule B, rule 11.

Where a firm had been summoned in the Magistrate's Court for a partnership debt, and service had been effected on some of the partners, and the Magistrate gave judgment against the partners who had been served in their individual capacity:—
Held, on appeal, that the judgment must be reversed.

H. W. Greenstreet summoned W. Murphy, D. Francis, A. J. Wolluter, A. Langford, D. Symons, H. A. Ward, N. M. de Kock, R. R. Hollins, G. W. Heckrath, and A. A. Rothschild, carrying on business as the Orange Free State Coal and Iron Association, in the Court of the Resident Magistrate of Kimberley for £30 due to the plaintiff as salary. The summons was served on Murphy, Francis, Rothschild, Symons, Wolluter, Ward, and De Kock. A copy was also

1884.
Feb. 19.
Rothschild and
Others vs. Green-
street.

1884.
Feb. 19.
—
Rothschild and
Others vs. Green-
street.

fixed to the door of Langford's last-known place of residence. As to Heckrath and Hollins, the Deputy-Manager returned that they were believed to be residing at Cape Town and in the Transvaal respectively. The defendants Rothschild, Symons, Francis, and Wolhuter were represented before the Magistrate. The plaintiff's attorney withdrew the case against Symons, and, after hearing evidence, the Magistrate gave judgment against Rothschild, Francis, Wolhuter, Murphy, Ward, and De Kock, the one paying the others to be absolved. The defendants appealed.

Hoskyns, C.P., for the appellants:—This action was against a partnership, and by the Magistrate's Court Rules the service was adequate, some of the partners having been served : Act 20, 1850, Schedule B, rule 11. But the Magistrate allowed the case to be withdrawn as against one of the defendants, which he had no right to do, and then gave judgment against certain individual partners, not against the Association. It might be arguable whether individual partners could be sued *in solidum* for the debt of the firm, but this had not been done here, and on the summons against the firm it was incompetent for the Magistrate to give judgment against certain individual members.

Bowles, for the respondents, submitted that each of the partners was liable *in solidum* for the partnership debt, and referred to *Van der Linden*, 577. The summons was directed against them as a firm, but judgment could be given against them individually.

The COURT held that the question of individual liability was not raised by the summons, which was directed against the legal *persona* of the firm, against which alone on such summons judgment could be given, though the assets of the several partners might on such judgment have been liable to execution. The appeal was therefore allowed, with costs.

[Appellants' Attorneys, HAARHOFF BROS.
Respondent's Attorneys, PALEY & COGILLAN.]

GEORGE vs. KIMBERLEY TOWN COUNCIL.

Municipal regulations.—Mistake of law.

Where certain moneys had been paid in satisfaction of a municipal rate, and the payment had been made either voluntarily, in order to test the validity of the rate, or under mistake of law :—Held, on appeal, that the payment could not be recovered back.

S. H. George summoned the Kimberley Town Council, in the Court of the Resident Magistrate of Kimberley, for the sum of 6s., money had and received by the defendants on the plaintiff's account. It appeared that in the year 1879 a tax was imposed by the defendants on occupiers of houses for the removal of night soil in pails at the rate of 6s. per pail per month. In October, 1883, payment for three months was demanded at the rate of 8s. per month, and the plaintiff said in his evidence, "I paid it—amount £1 4s.—thinking amount was correct, because I received an account for it." He now sought to recover the extra 2s. per pail, on the ground that the charge was illegal. It appeared that by certain bye-laws framed by the municipality, and duly approved and promulgated, they were authorised to make a charge of "not less than 6s. per month for each set of pails," and by a municipal notice, published in September, 1883, the charge had been fixed at 8s. per month. The contention for the plaintiff was that as a matter of common sense, and by analogy of other similar bye-laws in force in other municipalities, the words "not less than 6s." must be taken to be a clerical error for "not exceeding 6s." The Magistrate, however, held that the defendants were entitled to charge any reasonable sum in excess of 6s., and gave judgment in their favour. The plaintiff appealed.

1884.
Feb. 19.
George vs.
Kimberley
Town Council.

Levey appeared for the appellant and read the record.

LAURENCE, J. :—Is not this a case of money paid under mistake of law ?

1884.
Feb. 19.
—
George vs.
Kimberley
Town Council.

Levey :—The payment was rather made to test the legality of the increased rate.

The COURT :—Then if the plaintiff paid this amount voluntarily, and there was no mistake, how can he recover ?

Levey then argued that by the law of this Colony money paid under a mistake of law could be recovered back, and referred to *Port Elizabeth Divisional Council vs. Uitenhage Divisional Council*, Buch. 1868, 221.

Forster, for the respondents, was not heard.

The COURT held that if the appellant wished to test the validity of this charge, as was stated, he should have refused to pay and allowed himself to be sued, or he might have had a special case stated for the decision of the Court. Either he had paid the money voluntarily, believing he was under no legal obligation to do so, in which case he could not recover it; or he had paid it under a mistake of law, in which case there did not appear to be any “natural equity,” by which the present claim could be supported. The appeal was therefore dismissed, with costs.

[Appellant's Attorney, COGHLAN.
Respondent's Attorneys, CORYDON & CALDECOTT.]

QUEEN vs. KEVIET.

Act 28, 1883, § 75.

Section 75 of Act 28, 1883, not only imposes penalties for the sale of intoxicating liquors without a licence, but renders it an offence to do so ; the words “contrary to the provisions of this Act” are to be explained by reference to the exceptions contained in sections 2 and 16.

1884.
Feb. 19.
—
Queen vs. Keviet.

A native named Keviet had been convicted by the Police Magistrate of Kimberley of contravening sect. 75 of the Liquor Licensing Act, 28 of 1883, by selling intoxicating

liquor without a licence. The case came before Mr. Justice LAURENCE, as Judge of the week, and at his request the question whether the conviction under the section could be supported was now argued before the full Court. The section runs as follows: "Any person who shall contrary to the provisions of this Act sell, deal in or dispose of intoxicating liquors without a licence, or sell or offer, or expose for sale any such liquors at any place where he is not authorised by his licence to sell the same, shall upon conviction be liable to the following penalties, that is to say," &c.

1884.
Feb. 19.
—
Queen vs. Keviet.

Levey, for the accused, said the only question was whether sect. 75 of the Liquor Licensing Act made the selling without a licence an offence, or whether it merely provided the penalties for an offence created elsewhere in the Act. The words "contrary to the provisions of this Act" shewed that the latter was the case. The Act, however, contained no provisions against selling without a licence. It enacted *how* licences were to be obtained, but not *that* they were to be obtained. Penal statutes must be construed strictly; in any case it was submitted that sect. 75 did not in itself constitute the offence of which the prisoner was convicted.

Hoskyns, C.P., for the Crown, contended that the whole Act must be read in order to gather its scope and intention; *Maxwell on Interpretation of Statutes*, 18, 247. He referred to the wording of the former Acts, and especially sect. 46 of Ord. 9 of 1851, and sect. 57, Ord. 16, 1879, Griqualand West.

LAURENCE, J. :—Sect. 46 of the Ord. of 1851 says expressly "the person offending shall incur and be liable to the pains and penalties hereinunder set forth," &c.; and the local Ordinance, which is admittedly not a model of drafting, says the same thing impliedly, "In every case in which any Magistrate shall see cause to convict any person of any of the following offences," &c.; but here the wording is quite different.

JONES, J., referred to the cases which by sect. 2 were exempted from the operation of the present Act.

1884.
Feb. 19.
Queen vs. Keviet.

Hoskyns, C.P.:—There are no words in the Act elsewhere than in sect. 75 which prohibit the sale of liquor by unlicensed vendors, and if this section creates no offence the whole Act, of which the object is to regulate the sale of intoxicating liquors, is rendered nugatory and useless.

Levey replied.

BUCHANAN, J.P.:—No doubt we have to deal in this case with an ambiguity of language. The Legislature has not succeeded in making its meaning very clear, and the case, in my opinion, was a very proper one to be argued. In no portion of the Act before us does it appear to be specifically enacted that it shall be unlawful for persons to sell liquor without a licence; and yet to hold that the Act contains no provision on the subject would be to hold that the Legislature meant to sanction free trade in liquor, which, bearing in mind the object of the Act and the various regulations which it contains, is a construction which it seems quite impossible to admit. The question which we have to decide, and the only question arising on the record before us, is what is the meaning of the words “contrary to the provisions of this Act” in sect. 75? We must endeavour to give these words a reasonable construction, in order if possible to give effect to the intentions of the Legislature as clearly disclosed in the other portions of the statute. Now we find it is specially provided by sect. 2 that certain persons shall be exempted from the operation of the Act, and shall not be bound by the regulations it contains as to the sale of intoxicating liquor. It is not unreasonable, then, to hold that the above words in sect. 75 refer back to these privileged exceptions, and that the meaning is that any other person selling without a licence commits an offence and shall be liable to the penalties mentioned in the section. On these grounds I am of opinion that the conviction must be sustained.

JONES, J., concurred, and said that he was of opinion that selling without a licence impliedly created an offence by sect. 75. He came to this conclusion by reference to the provisions of sections 2 and 16.

LAURENCE, J.:—I have felt a good deal of doubt about this case, bearing in mind the principle that penal statutes ought to be construed strictly. Does sect. 75 of the new Licensing Act create an offence, or does it merely provide a penalty? In the latter case, the prisoner should not have been charged under it but under the section, if there be one, by which the offence is constituted. As a matter of fact, however, no other section distinctly declares it to be an offence to sell intoxicating liquor without a licence; and to hold that the offence is constituted by this section is, having regard to its wording, more difficult than in the case of the corresponding sections of the former Ordinances which have been cited. If the words “contrary to the provisions of this Act” had been omitted, the section would clearly have constituted the offence. I cannot admit, as has been suggested, that these words may be discarded as surplusage; in the construction of statutes all the words must be considered, and their due weight and, as far as possible, a reasonable meaning attached to them. But as there are no provisions, such as might have been expected, creating the offence, on the whole I concur in thinking that these words must be taken to refer to the exceptional cases of auctioneers, &c., mentioned in sections 2 and 16, and that when the Legislature said “contrary to the provisions of this Act” it was merely a clumsy way of expressing a meaning which would have been more correctly and clearly expressed by the words “except as in this Act is excepted.” I therefore concur in thinking that we must sustain the conviction.

1884.
Feb. 19.
Queen vs. Keviet.

KEEFER vs. THE GRIQUALAND WEST BOARD OF EXECUTORS
AND KEEFER'S TRUSTEE.

*Insolvency.—Trustee's lien.—Reversionary rights.—Effect
of rehabilitation.*

*R., trustee of the insolvent estate of K., handed over to K., for
what purpose was in dispute between the parties, certain
leases in his estate upon the security of which, or of the*

1884.
Feb. 20.
" 21.
" 22.
" 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

reversionary interest in which, K. obtained a loan from E., a Board of which R. was the Secretary, R. negotiating the loan, for the purpose of paying off his creditors. Subsequently K. obtained an order for rehabilitation without opposition; the trustee paid the creditors dividends, amounting to 20s. in the £, but no accounts were filed, and the estate was not wound up. K. then desired to pay off E., and applied for the leases, tendering the amount due on the loan. E. refused to give them up, and denied possession of them, on the ground that they were held by R., in his capacity as trustee of the estate, as security for the payment of his commission and of interest still due to creditors. K. then brought an action against E. for the delivery of the leases on payment of the amount due, and the Court ordered R. to intervene as co-defendant.

Held, that R. as trustee had parted with the leases and had no lien on them, and that E. must give them up to K. on payment of the amount due, but that K. must give security to R. for the amount still claimed by him as trustee.

This action was originally instituted against the Board of Executors only, and the declaration alleged that

- (1.) On the 1st March, 1882, the plaintiff executed a bond in favour of the defendant Board for £4000, with interest at the rate of 18 *per cent. per annum*, as security for which sum he ceded and transferred his title and interest to and in the leases of certain stands situate on the ground of the London and South African Exploration Co. (Limited).
- (2.) The actual sum due by the plaintiff to the defendant Board was £3800, of which amount the plaintiff had duly paid £500.
- (3.) On the 4th May, 1883, the balance of the said bond was called up by the Board, and the plaintiff thereupon offered to pay it with interest if the Board would transfer the property to the firm of Von Rönn, Schabbel & Co., of Port Elizabeth, who were creditors of the plaintiff, and the plaintiff placed the said amount at the disposal of the Board in the Bank of Africa at Kimberley upon such transfer being effected.

- (4.) The Board refused to accept the said money or to transfer the said property, or in any way to part with it, until the conditions of a certain agreement between the Board and Von Rönn, Schabbel & Co. (with which the plaintiff had nothing to do, and which formed no portion of the conditions of the said bond) had been fulfilled.
- (5.) The defendants still refused to transfer the property to the plaintiff or his nominees, or to transfer or cancel the said bond.
- (6.) The plaintiff was ready and willing to pay the capital and interest due to the Board on the bond, and hereby offered to do so, if the Board would at the same time transfer the said stands to him or his nominees.

1884.
Feb. 20.
„ 21.
„ 22.
„ 23.
Keefer vs. The
Griqualand
West Board of
Executors and
Another.

The plaintiff prayed for:—(i.) Transfer of his title and interest to and in the leases of the said stands; (ii.) The cancellation of the bond, or its transfer to himself or his nominees; (iii.) General relief and costs of suit.

The plea of the defendant Board

- (1.) Admitted paragraphs 1, 2, 3 of the declaration.
- (2.) As to paragraph 4, it denied that the plaintiff was in no way concerned with the conditions of the agreement with Von Rönn, Schabbel & Co., the said agreement having been entered into with the full knowledge and consent of the plaintiff; it further denied the refusal to transfer the stands as alleged; it alleged that the bond related to the right or title to the stands ceded by the plaintiff to the Board, and not to the stands themselves.
- (3.) It denied that the Board ever refused to cancel or transfer the bond to the plaintiff or his nominees on payment of the principal and interest due thereunder; but admitted that the Board had refused to transfer the said stands, the Board not having possession of them.
- (4.) The plea proceeded to state that the right and title to the said stands, transferred by the plaintiff to the

1884.
Feb. 20.
" 21.
" 22.
" 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

Board, consisted merely of his reversionary rights in respect of the same, as hereinafter set forth.

- (5.) The plaintiff was on July 20, 1880, adjudicated insolvent, and George Richards was appointed trustee of his estate ; on February 28, 1882, the plaintiff was rehabilitated.
- (6.) Upon the insolvency of the plaintiff the stands vested in the trustee and the estate, and were now held by him and formed part of the assets of the estate.
- (7.) After the plaintiff's rehabilitation the trustee on behalf of the creditors of the estate retained possession of the stands which remained registered in his name, as security for the due payment of certain sums for interest on debts due to the creditors of the estate, and for commission due to the trustee, and for other expenses of administration.
- (8.) On the 1st March, 1882, the plaintiff, with consent of the trustee, mortgaged his reversionary title and interest in the stands to the Board for £4000, subject to the said claims or liens of the trustee for the said interest and commission. Such reversionary interest in the said stands consisted of his right to have the said stands retransferred into his name by the said trustee after the claim or lien of the said trustee had been satisfied and discharged.
- (9.) The Board had never had possession of the stands, nor were they ever transferred to them or registered in their name, but they were and still are registered in the name of the trustee.
- (10.) The said right and title of the plaintiff is subject to the said prior claims or liens of the trustee of the plaintiff's insolvent estate, with which the defendant Board had nothing to do.
- (11.) The defendant Board had always been and still were willing, &c., and hereby tendered, &c., to surrender to the plaintiff his title and interest in and to the said stands, which he ceded to them in the said bond, on payment of the principal and interest due thereon, and they tendered to cancel the bond or to transfer the same to the plaintiff or his nominee.

In the replication the plaintiff said that he had always refused to recognise in any way the claim of the trustee to any lien on the leases ; that he had never been a party to or cognisant of any agreement between the Board and Von Rönn, Schabbel & Co., affecting his right to claim retransfer or re-cession of the leases on payment of the sum due on the bond ; he further said that if the trustee had ever had a lien such as is now claimed by him, which the plaintiff denied, he lost the same in January 1881, when he gave up the leases and buildings thereon to the plaintiff, and if not then that he lost it on the 1st March, 1882, when the bond was executed and the plaintiff's title to the leases was ceded and transferred to the Board with the full knowledge and consent of the trustee ; that the plaintiff did not cede or transfer any reversionary right subject to the alleged lien claimed by the trustee, but he ceded and transferred the whole of his title to the same, and that the cession was accepted by the Board as an unencumbered security for the amount advanced ; that after his rehabilitation the plaintiff converted the monthly lease of three of his stands into a lease for fifty years, and that he deposited the new lease as a further unincumbered security for the said advance ; the leases were now in the possession and under the control of the Board.

The rejoinder was general.

After hearing some of the evidence the Court ordered that George Richards, the trustee of the plaintiff's insolvent estate, who was likewise the secretary of the defendant Board, should intervene as a co-defendant and file a separate plea. The following pleadings were then added to the record :—The plea of Richards, in his capacity as trustee of the estate of the plaintiff, after repeating the allegations in paragraphs 4, 5, 6, 7, 8, 9, 10 of the Board's plea, proceeded to allege that he had at no time parted with the said leases to the Board, but that he had them and always had had them in his possession, save that in December 1881 he had given them up to the plaintiff for the sole object of enabling him to convert the monthly licences, by which he held some of his stands, into a fifty years' lease, upon the accomplishment

1884.
Feb. 20.
„ 21.
„ 22.
„ 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

1884.
Feb. 20.
„ 21.
„ 22.
„ 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

of which, in March 1882, the plaintiff had handed them back to him as trustee, in which capacity he had ever since held them. The plea further alleged that, though the plaintiff had obtained his rehabilitation, his insolvent estate had not yet been closed, and the defendant was still acting as trustee thereof; that certain claims for interest and commission were still due from the estate to the creditors and to the trustee, but no assets remain in the trustee's hands save the properties covered by the said leases and the buildings thereon, and the defendant said that he was entitled to retain possession of the said leases until the satisfaction of the said claims against the estate, and that he had at no time parted with the possession of the leases to the plaintiff or any other person to enable the plaintiff to raise money upon them. For replication to this plea the plaintiff joined issue.

For the plaintiff, *Hoskyns, C.P.*

For the defendants, *Forster* (with him *Lange*).

The evidence was very voluminous, and the effect of it and of the arguments of counsel will fully appear from the judgments given below. The case was heard on February 20, 21, 22; when, after hearing the arguments,

Cur. adv. vult.

Postea (February 28),—

BUCHANAN, J.P., after reciting the pleadings, said:—In this case it is manifestly necessary to distinguish between the defendant Board and the defendant trustee. Considering the case before the Court as it stood in the first instance, as a question between the plaintiff and the Board, the only question that I can see as between them, which it is necessary now to dispose of, is one of fact, unconnected, as between them, with any complicated question of law, and that simple question of fact is, Has the Board of Executors ever had possession of the securities for its advances on the conditions of the bond, or did the trustee hold them *qg.* the estate, which would put them within his direct power and beyond the Board's? The bond, which is the contract between the

parties in respect of which this contract is brought, says in terms that "Louis Keefer acknowledges himself to be indebted in the sum of £4000 to George Richards in his capacity as secretary for the time being of the Board of Executors, for the security whereof he binds generally his person and property, and more especially declares to have ceded and transferred to George Richards in his said capacity all his right, title, and interest in and to the leases of certain stands or building lots numbered respectively 173, 174, 145, and 174, 176, and 199 in the books of the London and South African Exploration Company (Limited), situate on the Newton estate, together with all the buildings and erections thereon, and appurtenances to the same in any way belonging." An attempt has been made by Mr. Richards to convince the Court that the Board *quâ* Board never had possession of the securities, but to my mind that attempt has signally failed. Not only does the bond pledge the right, title, and interest, but other documents, notably the very written applications for the loans, the power of attorney, guarantee, &c., all written documents, speak of the Board's possession in terms. Moreover, every business consideration, if we are to assume ordinary capacity in the Board or its secretary (incomplete as were some of its dealings, such as the non-possession until lately of a "security register," the non-reports by weekly directors approving verbal loans, the non-minuting of such important transactions, and the exact terms in which carried out),—I say every "business" consideration one would expect in a trust company points in the same direction. To suppose that such a Board will advance a man who has just been through the Insolvent Court, under whatever circumstances, £3800 on property worth at the outside £4000 to £5000, without getting possession of his securities, the very first thing rigorously insisted on, but leaving them in the possession of his trustee and open to possible complications, is, to my mind, to suppose a business impossibility. The difficulty in this case has arisen from the unfortunate dual capacity of George Richards, who filled the two *personæ* of trustee of the estate of Keefer and secretary of the Board of Executors. And I think if any case shews the inadvisability of such union it is this. In his capacity as secretary he

1884.
Feb. 20.
" 21.
" 22.
" 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

1884.
Feb. 20.
„ 21.
„ 22.
„ 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

recommended to the Board an advance of so large an amount to a person of whom as trustee he knew the situation, without seeing that the Board got possession of the securities, as he would have us believe ; on the contrary, deliberately retaining them as trustee. I cannot believe anything of the kind. On the contrary, I believe that Richards, as secretary, directly protecting the interests of his Board, as he was bound to do, got the securities for the Board, and even made the estate pay the transfer dues to the Board. I think it is not an unreasonable assumption for a Court of law when it finds a person acting in two or more capacities so important as the secretary to a trust company and trustee of an insolvent estate, with possibly conflicting interests, to require that such person should at every step have indicated his different capacity, which, for whatever reason, Mr. Richards did not do ; and if in the result the party with whom the dealing was alleges a dealing in one capacity, and the circumstances seem to support him, then the dual person must be armed with the closest proof ; this is one of the first requirements of his self-imposed dual action, and this is just where Richards has failed. As trustee of the estate he needed no transfer ; for it is one of the most elementary principles of the Insolvent Ordinance that the trustee steps into all the rights of the insolvent without formal transfer. But Richards's explanation on this point is that Keefer having been rehabilitated he, Richards, on that point got possession of the securities in order specially to protect himself and the creditors for commission and interest. It appears to me that this is altogether an afterthought. The surrender of Keefer, as the trustee's report shews, was exceptional. The trustee rather glories over the fact that Keefer will pay 20s. in the £1, and that the properties *must* revert to him. Keefer is in the exceptional position, for an alleged insolvent, of having paid 20s. in the £1 ; but the trustee who seems, when he undertook the management, to have been very inexperienced in estate management—in fact this was, as he admits, his first large estate, which may be the solution of some points, without imputing to him anything further—strangely, no doubt, overlooked the fact that the creditors had to get interest as well as their full capital. He has, in my opinion,

endeavoured to protect himself and the creditors from the results. In this attempt he may be right or wrong, but on the only question as between the plaintiff and the Board, I am clear that the securities were the condition of the advance ; that if the plaintiff repays the advance, he must get back his securities, and that there must be a judgment for plaintiff as against the Board. It is almost impossible to conceive anything simpler than the case as between the plaintiff and the Board. The matter stands shortly and simply thus : A. and B. contract to advance, as I believe, on certain securities, and if the debtor repays the creditor, back those securities go to him; for why should the creditor, getting back his money, keep the securities? As to some of the securities, the case is even stronger than as to the others, for it was Keefer's own act which, after his insolvency and rehabilitation, converted a far lesser security into a far greater, in fact almost an absolute, title. Did he do this for his trustee? No; he did it for his new creditor, on his connection with whom so much of his future success, in fact his fresh start in life, would depend. And now, when he says he is ready to repay that creditor whom he thus secured (and if he does not pay him, of course our judgment will not benefit him), the creditor turns round upon him and says: "I have not the securities, your trustee has them; settle with him;" although in his pleadings he inconsistently says: "With the trustee I, the creditor, have nothing to do;" and although the bond contains no mention of the trustee or his rights, as the plea avers it does, on which point it is wholly unsupported by evidence. In short, on the balance of the evidence, it, in my opinion, largely preponderates (whatever doubts there may be here and there on that evidence) in favour of the Board's possession of the securities and consequent obligation to return them on repayment. The fact is, the Board have attempted to protect the secretary as trustee, and the trustee has attempted to protect the Board; but I think it was not at all difficult to see the exact position of matters. On the interesting question suggested by my brother JONES whether the leases expired on Keefer's insolvency, I do not consider it necessary to enter, inasmuch as that may be an important question

1884.
Feb. 20.
" 21.
" 22.
" 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

1884.
Feb. 20.
" 21.
" 22.
" 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

between the London and South African Company and its lessees who become insolvent, and no doubt under some circumstances requiring the closest consideration; I fully recognise its importance, but do not see that it can relieve the Board from the evident necessity, on repayment, of restoring what I believe it got, even if these securities as between other parties might prove absolutely worthless, a point on which I prefer now to offer no opinion in this case. But, as I have said, the Court ordered the intervention of the trustee, and it was necessary to consider the case further in connection with him; I say "consider" the case, not necessarily to give any decision which may be binding as between the plaintiff and the trustee. The plaintiff in so far repudiates the present claim of his trustee, that he disputes the claims to interest and commission, and says that on other proceedings he would successfully contend that the fact of the plaintiff's rehabilitation, permission to trade, execution of the bond, and what further took place, was an abandonment by the trustee, to the insolvent, of the property in the estate, and a waiver of interest and commission. Considering how long this case has been pendant, considering the necessity for a quick and full decision of it, I should have been glad to have, in the present case, if possible, settled all these questions between the parties. But as the learned *Crown Prosecutor*, for the plaintiff, in his discretion, urges the impossibility of this, and as, on reflection, one must agree with him, it is of course impossible to determine these points in this action. But we will by our guarded order leave the matter in such a position that there will be questions open for further consideration. While on the one hand we will require the Board to return securities to which, when properly released, it has no further right, we will not decide further. Still, it is evident that at the outside the whole of the trustee's claim for interest and commission cannot be more than, say, £1000, the furthest he has put it to in his account still unconfirmed. As against that he seeks to retain all the properties confessedly far more valuable. On the one hand there will then be the question, Was the trustee right in this? and on the other hand, Was the insolvent right in refusing for whatever cause to pay the

trustee's commission? The objection to interest we understand has been withdrawn, but there is no evidence of it. The claim to commission may or may not be allowed when the Court comes to consider the final liquidation account, but we cannot now prejudge what we may do at that stage not yet arrived at. Our order therefore is: That the defendant be ordered to deliver up to the plaintiff, within a fortnight, certain documents, to wit, all the leases, and re-transfer to the said plaintiff all his right, title, and interest in the said leases on payment by plaintiff to the Board of Executors of the sum of £3300, together with interest due to date of summons upon the bond dated 1st of March, 1882 (the said bond to be thereupon cancelled), and upon the plaintiff's further giving security to the satisfaction of the Master for the sum of £1000 to abide the decision of this Court with regard to any claim for interest due to the creditors of the said insolvent estate and commission claimed to be due to the said trustee. The proviso as to security not to apply to lease of stand No. 199, but the said lease to be at once handed over upon payment to the Board of the £3300 with interest, the plaintiff to have his costs as against the Board, and costs as between plaintiff and trustee to come out of the estate.

1884.
Feb. 20.
" 21.
" 22.
" 23.

Keefe vs. The
Griqualand
West Board of
Executors and
Another.

JONES, J.:—In this case I do not deem it necessary to go over the same ground as to the questions of fact of possession in the Board of Executors, already at length dealt with by the Judge-President, with whom I agree, nor is it necessary that I should again detail the pleadings. I shall merely present another view of the same facts in a light in which they appear to me. In July 1880, when the order sequestrating Louis Keefe's estate was made, the insolvent was divested by the 46th section of the Insolvent Ordinance, and the Master of the Court was invested, "for the uses and purposes of the sequestration, with all the present and future estate, movable and immovable, personal or real, and every right, title, and interest in and to any property, movable or immovable, personal or real, which belonged or was due to the insolvent at the date of making such order, or as to which any right of reversion might be vested in him, or which might thereafter be purchased or acquired by or

1884.
Feb. 20.
" 21.
" 22.
" 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

might revert, descend, or be devised, or come to the insolvent at any time before the making of the order of Court allowing and confirming the account and plan of distribution to be framed by the trustee." To this rule there are the exceptions in the 49th section of the Ordinance 6 of 1843, which don't affect this case. All deeds, vouchers, papers, or writings respecting these rights and interests of the insolvent would be also vested in the Master. On the 23rd of July, 1880, by virtue of the 47th section, all these rights of L. Keefer were, by virtue of their appointments as provisional trustees, vested in George Richards and George Webb Austin, and remained so vested in them until the appointment of Mr. George Richards as sole trustee after the removal of Austin. Mr. Richards was not confirmed in his office of sole trustee until February the 10th, 1881, the order being actually dated the 12th of February. Under the 49th section, Louis Keefer was incapacitated from acquiring property as against his trustee between the order of sequestration and confirmation of account, and he was to be deemed and taken to have no power to bind his trustee, or the insolvent estate vested in the trustee, by any sort or description of dealing, contract, or transaction whatsoever, unless the same "shall have been entered into by virtue of an authority to that effect from his trustee in *writing*." To this general rule there are certain exceptions which do not affect this case. At the date of the sequestration the insolvent had certain right in some leases and stands, the *dominium* or property in the said stands being vested in the London and South African Exploration Company as lessors. The leases to which the insolvent laid claim were the following:—

(1.) Lease of Lot No. 145, made by the London and South African Exploration Company in favour of Alfred A. Rothschild on the 21st of August, 1876, for the period of 21 years from the 1st of January, 1876.

(2.) Lease of Lot 174, made by the same Company in favour of Theophilus Schreiner on the 12th of December, 1876, for 21 years from the 1st of June, 1876, and transferred to Keefer on the 30th of August, 1878.

(3.) Lease of Lot 173, made by the same Company in

favour of Louis Keefer on the 2nd of April, 1880, for 21 years.

(4.) Three monthly stand licences for the Lots 174, 176, and 199.

Would the sections already cited vest these in the trustee? According to the 104th section of the Insolvent Ordinance these leases ceased and determined on the 15th of July, 1880, viz., on sequestration; and I take it that unless we can gather from the conduct of lessors, lessees, and trustees something which would enable the leases to continue, they must have ceased as the Ordinance declares they shall. Under the 104th section the trustee would have certain rights and interests in these leases to which the insolvent was entitled at the date of the sequestration, but by insolvency the trustee does not at once stand in the lessor's position. The lessee's right—contractual in its nature—as between himself and his lessor, would not be vested absolutely in his trustee, though, *under the circumstances mentioned in the Act*, the trustee might become the lessee in place of the insolvent and continue to derive all the advantages and benefits which the insolvent had under these leases. We have as a portion of this case to consider whether the trustee ever did become so vested with rights in these leases, and if he did, at what period this happened. On the 6th of January, 1881, the third meeting of creditors was held, and, instead of any resolution being taken under the 104th sec. by the creditors, we find that it was resolved that “permission should be given to the insolvent to trade and occupy the premises free of charge, and that the future management be left to the discretion of the trustee.” No doubt the trustee and creditors at this period and all through the management of this estate had particularly hazy notions as to their rights, duties, and liabilities with regard to these leases, or they would have dealt in a very different manner with them. At this time the documents were in the power of procurement of Richards, and were locked up regularly in the safe in the office of the Board of Executors. It is admitted that the safe was the Board's property. I think that in January Richards thought that as trustee he would have no more bother about these leases, and that the estate would be wound

1884.
Feb. 20.
" 21.
" 22.
" 28.

Keefer vs. The
Griqualand
West Board of
Executors and
Another.

1884.
 Feb. 20.
 " 21.
 " 22.
 " 28.
 —
 Keefer vs. The
 Griqualand
 West Board of
 Executors and
 Another.

up with success and 20s. in the £1 paid all round. Keefer took possession of the stands, and remains in possession at the present day. On the 28th of February, 1881, Keefer obtained his rehabilitation. No dividend had been paid, no account filed, or apparently even thought of by the trustee, and no opposition is made to the rehabilitation. He is allowed by the trustee and creditors to take possession of the stands precisely as if his whole estate had been wound up, as it should have been, and the remainder of the estate had been handed over to him after all claims upon it had been paid or satisfied; and no step whatever is taken to vest in the trustee any benefits or advantages which he might have had under the 104th section. After his rehabilitation Keefer wished to start in business life again, and visited England for purposes connected with his trade. Before doing so he saw Richards, and, I believe, made arrangements for a loan of money, and I take it that the security for that loan was to be the leases then in the possession of Richards. In June 1881 the stands are hypothecated to the Board for £700, and this with the knowledge of the trustee, who has up to this moment done nothing to secure his rights under section 104. In October 1881 a further advance of £800 is made on the same premises by G. Richards *qq.* the Board of Executors. The forms of application shew precisely what Keefer thought of his position, and these forms seem to be the only record kept by the Board of these transactions. Meanwhile Keefer is making improvements on the premises, and the trustee, though he has not filed his account and plan of distribution, distributes dividends without the sanction of the Court. On the 1st of March, 1882, Keefer, wanting more money, passes the bond which is the basis of this action against the Board of Executors. By it he acknowledges his indebtedness for £4000; and for the better security of the loan, after binding his person and property generally, he declares to have ceded and transferred to the said George Richards, in his capacity as secretary to the Board, all his right, title, and interest in and to the leases of certain stands or building lots numbered 173, 174, 145, 174, 176, and 199. It should be remembered that Rothschild's lease had been transferred

to Richards in March 1881, and so had the lease made in favour of Schreiner. The lease 173, in favour of Keefer, had been ceded to "Richards, N.O.," in August 1881. The stand licences were not converted into a 21 years' lease until the 20th of March, 1882; but no cession was specially made to Richards by Keefer. At that time, therefore, Richards was in possession of the documents upon which title to possession of the stands depended, and three of the leases were in his name; but not as trustee of the insolvent estate, as far as one can see by the written documents. As trustee, had he done anything to take advantage at this time of his rights under the statute? I do not think he had; and I do not think that at the time the idea of creditors' claims for interest or the security of his own claim for commission troubled him much. The Board had, however, made a special contract, and upon that they are now sued. As far as they are concerned, I believe they simply looked upon Richards as the holder of those documents on their behalf. It is too late for them now to try and shield themselves behind some possible right which the trustee may have in their leases, and which, in my opinion, the trustee has not, as far as I can at present see, taken the proper precautions to secure for the benefit of the creditors. However, the result is that the plaintiff, as against the Board, is entitled to judgment, and as it would only be fair to creditors, should they be able—as represented by their trustee—to make some claim upon Keefer's estate, I think he should give security. This course can do no harm, and seems to me to be one which is most equitable and natural under the circumstances. As to the effect of the 120th section, so far as it gives the insolvent a discharge, and the conflict of right which at present appears to be caused in this estate under the 48th section, owing to rehabilitation having preceded the confirmation of the account, we have at present determined nothing. It seems probable that this matter will again come before the Court in another form (*a*).

1884.
Feb. 20.
" 21.
" 22.
" 28.

Keefer *vs.* The
Griqualand
West Board of
Executors and
Another.

[Plaintiff's Attorney, COGILAN
Defendants' Attorneys, HAARHOFF BROS.]

(*a*) LAURENCE, J., recused himself from sitting in this case.

RAMASWAAY AND RAMKEIT *vs.* CUMMING.

Contract between agent and client.—Magistrate's Court pleadings.—Effect of denial of contract, followed by plea of tender.

Where an agent sued on an alleged contract for payment of an agreed sum for the defence of certain persons in a criminal case, who after the alleged agreement had employed another agent to defend them, and the defendants denied the contract but pleaded a tender of a certain sum for the services actually rendered by the plaintiff:—Held, on appeal, that the plaintiff had not proved the contract, and that the tender did not constitute such an admission as to entitle him to judgment for more than the amount tendered.

1884.
Feb. 21.

Ramaswaay and
Another *vs.*
Cumming.

This was an appeal from the Resident Magistrate of Du Toit's Pan. The respondent had sued the appellants in the Court below for the sum of £20, as damages for the breach of a contract by which he had engaged to defend them on a charge of robbery, for the fee of £20, which work he had been at all times ready and willing to do, but from the performance of which he had been prevented by them. In the Court below the then plaintiff deposed that on a Friday night in December, 1883, some friends of the defendants had come to him and he had accompanied them to the gaol, where the defendants were then incarcerated on a charge of robbery. He saw the defendants and busied himself in trying to procure bail. Not succeeding in procuring bail, he appeared in Court on the following morning for them, and the case was then remanded. On Sunday he by appointment waited on the defendants in gaol accompanied by an interpreter, and through him informed them that he wanted £20 for his service. The interpreter spoke to them and informed the plaintiff in their presence that they accepted his terms. He then told them he would want the money in advance. Later in the same day he heard that defendants had engaged another agent for £10. On Monday morning plaintiff appeared in Court to defend the prisoners, but they told the Magistrate that they did not require his services, and some-

one else appeared on their behalf. Thereupon he brought his action. The defendants had at first pleaded merely a denial of the debt ; but after plaintiff had given his evidence a plea of tender of £5 was, on their application, added.

1884.
Feb. 21.
Ramaswaay and
Another vs.
Cumming.

The plaintiff at the trial before the Magistrate was not able to call the interpreter, who had gone to Natal ; he could not swear that the interpretation was correct. The defendants and another witness entirely denied the contract. They did not recognise the interpreter as their agent, and did not know whether he interpreted correctly. They had not authorised anyone to contract for them in this matter. The Magistrate gave judgment for the plaintiff as prayed, with costs, holding that the contract had been made between the parties, and that the defendants, when they found they could get the work done more cheaply, had tried to shuffle out of the bargain. From this decision the defendants appealed.

Levey, for the appellants, contended that there was no evidence at all of the contract, for even if the interpreter agreed to pay £20 to the respondent, there was no proof that he was the appellants' agent. On the contrary, he accompanied the respondent to the gaol and he must be taken to have been his agent. As to the agreement itself there was no proof of that, for no one could say whether the interpreter correctly interpreted between the parties. The tender of £5 was not on the alleged contract, but for the work and labour which the respondent actually did. In any case, there was no breach of contract, for the respondent had not acted on the contract. He undoubtedly did some work, and he should have brought an action *ex mandato* for *quantum meruit* (*Mayne on Damages*, 190, 3rd ed. ; *Inchbald vs. Western Neilgherry Tea Co.*, 34 L. J. C. P., 15). The defendants in effect denied any liability on the contract, but pleaded that, if liable, £5 would cover the plaintiff's damage. The plea does not admit the contract. Moreover, an agent cannot take advantage of his position and of the ignorance of people like the appellants to make an exorbitant bargain. It was a question whether he could sue his client for fees before they had been properly taxed.

1884.
Feb. 21.
—
Ramaswaay and
Another vs.
Cumming.

Hopley, for the respondent, contended that the fee charged was not exorbitant in the circumstances. The accusation against the appellants was a most serious one, and conducting the defence would probably have entailed a large amount of work and great loss of time. In such a case an agent has a right to make a contract of service with his client over which the taxing-master would have no jurisdiction. Assuming that the contract was made, it could not be contended that £5 was a sufficient measure of damages for breach. The CHIEF JUSTICE had said in the case of *Nixon vs. Blaine & Co.*, Buch. S. C. Repp. 1879, p. 217, that the principles of law which apply to the letting of one's services are substantially the same as those which regulate the letting of one's property. This *dictum* had been cited with approval in the Court of the Eastern Districts in the cases of *Hunt vs. E. P. Boating Co.*, 3 Buch. E. D. C. 12, and of *Denny vs. S. A. Loan, &c.*, Agency, *ibid.* 47. If this had been a contract for the hire of immovable property for a definite term, and the defendants had broken the contract by leaving the premises before the expiration of the term, the damages would be the whole of the unpaid rent for the term, and they could not free themselves by tendering only for the time during which they had occupied the premises. On the evidence, he contended that the Magistrate was justified in coming to the conclusion that there had been a contract between the parties. The appellants admitted some of the conversation in the gaol, and really denied only the contract. In this the Magistrate did not believe them; and their plea of tender contradicted their own evidence, for that was an admission of the contract.

LAURENCE, J. :—If the plea of tender was an admission of the contract and understood to be such by the Magistrate, why did he afterwards admit evidence for the defence denying it *in toto*?

Hopley :—He ought not to have admitted it; but he did admit it and then did not believe it. This was mainly a question of fact, and the Magistrate who heard the witnesses had sufficient evidence before him to justify him in coming to

the conclusion at which he had arrived. In any case, as the pleadings stood the appellants were properly ordered to pay the costs in the first instance, for they had pleaded a tender with a denial of the debt: *Mostert vs. Fuller*, Buch. 1875, 23; *Jones vs. Borrodaile & Co.*, *ibid.* 38; *McDonald vs. Bramson*, *ibid.* 40.

1884.
Feb. 21.
Ramaswaay and
Another vs.
Cumming.

BUCHANAN, J.P.:—I am of opinion that the Magistrate's judgment in this case must be changed, as there is no proof of the making of the contract for the breach of which the action was instituted. The respondent certainly did some service; but there was no clear contract for £20 as payment to him for the services he was to render. The fact seems to be that he demanded this sum, and the appellants' friends then went elsewhere and procured cheaper assistance. The question is whether £5 was a sufficient remuneration for the services rendered irrespective of the contract, assuming that those services could be claimed for under this summons, and the Court is of opinion that that sum was ample. I don't think it was ever intended by the tender to admit the contract; that plea meant "The contract is entirely denied, but some work *extra* the contract was done, for which £5 is hereby tendered." The form of pleading in inferior Courts must not be construed too strictly. It will therefore be ordered that the Magistrate's judgment be changed to judgment for the plaintiff for £5, with costs to the date of tender. The appellants will have the costs incurred in the Court below after the tender, and also the costs of appeal.

JONES, J., and LAURENCE, J., concurred.

[Appellants' Attorney, BEEVOR.
Respondent's Attorney, NICHOLLS.]

HILL & PADDON vs. BORCHERDT.

Arrest.—Assignment by peregrinus to incola of debt incurred by another peregrinus.

B., a resident in Native Territory, contracted a debt to C. in the Transvaal State. C. assigned the debt to H. & P.

merchants of Kimberley. On B. coming to Kimberley, H. & P. arrested him to found jurisdiction. Held, that the arrest must be confirmed.

1884.
March 4.
" 5.
" 6.
—
Hill & Paddon
vs. Borchardt.

The respondent had contracted a debt of £468 to Clarkson & Co., of Bloemhof in the Transvaal State, and they had assigned the debt to the applicants, who were a firm trading in Kimberley. The respondent was a trader, resident in the territory of David Massouw, an independent native chief. He had come to Kimberley and the applicants had arrested him there, the writ having been issued on their affidavit that he was about to leave the jurisdiction.

Hopley applied for the confirmation of the writ of arrest.

The COURT referred to the case of *Wilhelm vs. Francis*, Buch. 1876, 216, and, doubting whether in such circumstances the assignee of the debt had a right to arrest the debtor, ordered the matter to stand over.

Postea (March 5),—

The COURT requested *Lange* to argue the matter on behalf of the debtor.

Postea (March 6),—

Lange shewed cause against the confirmation of the writ. He said that upon an examination of the authorities he thought that it was competent for an *incola* to arrest a *peregrinus* upon a cause of action ceded to the plaintiff by a countryman of the defendant; but he had been unable to find any case or any authority exactly to cover the present case, where the assignor, the assignee and the debtor all lived in different States. The original creditor was a resident in the Transvaal, the defendant, the original debtor, resided and traded in Massouw's territory, and the assignee alone resided in this territory. It was admitted that the *locus contractus* was in the Transvaal, and that the obligation was assignable by the law of that State. *Voet*, on this

point, treats of cases where two citizens of one State come into another and there one arrests the other to found jurisdiction. The Supreme Court had, in the case of *Wilhelm vs. Francis*, refused to confirm an arrest of movables in the Cape Colony to found jurisdiction to try a matter in dispute between two foreigners both absent; and DE VILLIERS, C.J., laid stress upon the fact that the cause of action arose out of the jurisdiction, and that the contract was not to be performed in the Cape Colony. Moreover, as to the ruling in *Dunell and Stanbridge vs. Van der Plank*, 3 Menz. 112, the CHIEF JUSTICE evidently considered it erroneous.

1884.
March 4.
" 5.
" 6.
—
Hill & Paddon
vs. Borchardt.

LAURENCE, J.:—If an obligation is capable of assignment by the *lex loci contractus*, is not the assignee in the same position as if he were the original creditor? (His Lordship referred to *Westlake, Private International Law*, sect. 221; and to *Innes vs. Dunlop*, 8 T. R. 595).

Lange:—*Voet*, 2, 4, 46, was certainly a strong authority in favour of the assignee's right to arrest, but the question here was (to use the words of MENZIES, J., in *Hornblow vs. Fotheringham*, 1 Menz. 365) whether this Court, whenever applied to by any *peregrinus* alleging a claim against any other *peregrinus*, is bound in every case, and without regard to the circumstances in which the parties are placed, to use its process of arrest in order to create a jurisdiction to itself over a person, of or over whom, otherwise, it would not have been the legal *forum*, or have had civil jurisdiction; and if not, whether the circumstances of the present case were such as to warrant the Court in doing so in this instance. He was informed that the High Court of the Orange Free State had refused to arrest a Kimberley debtor at the suit of a Kimberley creditor on the ground that they were two *viatores*, and that the Court had no jurisdiction in such a case.

Hopley, contra:—The respondent's obligation to the assignor was personal, and he could be sued upon it in any *forum* within the jurisdiction of which he happened to be. The obligation in this case was entered into in the Transvaal and was assignable by the law of that State. It had been

1884.
 March 4.
 „ 5.
 „ 6.
 —
 Hill & Paddon
 vs. Borchardt.

assigned to the present applicants, who therefore stood in the position of the original creditor and had all the rights he had had. When the respondent left his own *forum*, and came into the jurisdiction of this Court, he was liable to be sued by the assignee upon this obligation, and to be arrested upon a suspicion of flight, that being part of the remedy given by the law of this territory; *Story, Conflict of Laws*, §§ 568–574 d., also §§ 543, 553, 554, 556, and *Voet*, 2, 4, §§ 36–46, especially § 46. The reasoning of MENZIES, J., in *Hornblow vs. Fotheringham* did not apply to the present case, in which the applicant was an *incola*. In *Wilhelm vs. Francis* the applicant and respondent were both foreigners, and both absent from the jurisdiction of the Supreme Court, and the bare fact that some movable property was temporarily in the Colony was not sufficient to cause the Court to interfere by an attachment to found jurisdiction. The present case was different; the applicant had the right to apply to this *forum* for the remedy granted by law in such cases.

BUCHANAN, J.P.:—I have no doubt, after a review of the authorities, that in this case the arrest must be confirmed. The principle involved is an important one, and the Colonial Courts have hitherto not decided it. The point the Court has to decide is whether an *incola* can in this territory arrest a *peregrinus* for a debt ceded to him by another *peregrinus*, and due upon a foreign contract. *Voet*, 2, 4, 46, is an authority strongly in favour of an affirmative answer to this question; and there seems to be no reason why, in the interests of commerce, debtors in these cases should receive any special favour. The remarks made by Mr. Justice MENZIES, in *Hornblow vs. Fotheringham*, apply as between litigants, both of whom are strangers and foreign to the jurisdiction; and in the case of *Wilhelm vs. Francis* the CHIEF JUSTICE guarded himself from expressing any opinion beyond the requirements of that case. In the present case we have a *bonâ fide* assignee who is entitled to employ the remedies afforded by this *forum*. I understand that in the unreported case of *Van Balkergem vs. Van Nickerk*, decided by Sir JACOB BARRY, then Recorder of the High Court, in

1878, the arrest, in Kimberley, of a Free State subject at the suit of a Cape Town creditor, to found jurisdiction in a suit arising upon a promissory note made in the Free State, was confirmed. I think that the arrest in the present case must be confirmed with costs.

1881.
March 4.
" 5.
" 6.
Hill & Paddon
vs. Borchardt.

JONES, J. :—There would not have been any doubt in the present case had its solution depended on English law ; but as some of the Roman-Dutch authorities seemed conflicting, the doubt has arisen. It is clear that an assignee may sue in his own country on a debt contracted in a foreign country, if the *lex loci contractus* allows the assignment of the debt ; *Westlake, Private International Law*, §§ 116, 122 (ed. 1858) ; *Smith, L. C. i.* 699 (7th ed.), notes to *Mostyn vs. Fabrigas*. This appears also to be the rule of Roman-Dutch Law. The applicants, therefore, being in a position to sue here, are entitled to arrest the respondent.

LAURENCE, J. :—The original contract in this case, between Clarkson & Co. and the respondent, gave rise to a personal obligation. *Actor sequitur forum rei* ; and as long as the respondent remained in Massouw's country he was safe from any suit in the Courts of the Transvaal or of this territory. But if he were voluntarily to leave his domicile and enter the Transvaal the original creditor could arrest him there. That being the case between the original parties, the next question is, what are the position and rights of the assignee ? An assignee may sue in England on a debt assignable by the *lex loci contractus* ; *Innes vs. Dunlop*, 8 T. R. 595. This debt is admittedly assignable in the Transvaal, and accordingly, on the general principles of private international law, the assignee stands in the same position as the original creditor, and, which is nearly but not quite the same thing, in the same position as if he had himself been the original creditor : *Westlake*, ed. 1880, § 221, with authorities there cited. Now if the debtor be a *peregrinus* and he enter the creditor's *forum*, the latter can arrest him there *iurisdictionis fundandæ causâ*. The assignee has the same rights, as is shewn by the very strong authority in *Foot*, 2, 4, 46. I concur therefore in thinking that the arrest must be con-

1884.
 March 4.
 „ 5.
 „ 6.
 —
 Hill & Paddon
 vs. Borchardt.

firmed. I would add that, if the respondent had shewn any equities in his favour either as against the assignor or the assignee, the Court might have been able to afford him relief; but nothing of the kind has been shewn.

The defendant thereupon admitted the debt, and the Court granted final judgment against him for the amount claimed with costs. He was then discharged.

Postea (same day), *Hopley* applied for leave to arrest the defendant. A writ of execution had been taken out upon the judgment debt and the sheriff had returned *nulla bona*. The petition also alleged a suspicion of flight.

The COURT granted leave to arrest the defendant.

Postea (next day), the defendant was brought before the Court and admitted that he intended to return to his business.

The COURT confirmed the arrest *pro tempore*, but intimated that if it was desired to detain the respondent it would be necessary to apply for a decree of civil imprisonment.

[Applicants' Attorneys, HAARHOFF BROS.]

WOLHUTER vs. FOOTE.

Motion to set aside judgment and re-open case.—329th Rule of Court.—Service of summons.—Place of business of partnership.

F., the secretary of a partnership association, obtained judgment against the association, by default of appearance, for an amount alleged to be due to him for salary and commission. The summons purported to have been served on the chairman of the association, at its office or place of business.

W., one of the partners, subsequently applied to the Court to set aside the judgment on the grounds that the service had been at the place of business of the chairman and not at that of the association, and also that he had a good ground of defence to the claim owing to the negligent performance by F. of his duties as secretary, whereby he had sustained damage. F. alleged that the summons had been duly served on one of the partners at the place of business of the association, and also denied the alleged negligence, and in such denial was supported by the evidence of the chairman and of three other partners.

Held (LAURENCE, J., dissentiente), *that the office where the summons was served was not the place of business of the association, and the service was therefore bad, and that, as the applicant had disclosed prima facie grounds of defence, the judgment must be set aside and the case re-opened on condition of W. giving security both for the amount claimed and for the costs of all the proceedings.*

On February 21, 1884, S. M. Foote obtained judgment in the High Court in default of appearance against W. Murphy, H. Ward, E. W. Heckrath, N. M. de Kock, S. Francis, A. J. Wolluter, A. Langford, R. R. Hollins, J. Holder, and A. A. Rothschild, "carrying on business in co-partnership in Kimberley and the Orange Free State, under the style or title of the Orange Free State Coal and Iron Association," or the sum of £509 16s. 1d. for salary and commission due to him by the defendants, and moneys paid and advanced by him at their request. The deputy-sheriff's return stated that the summons had been served at Kimberley, on February 9, "by delivering to A. A. Rothschild, chairman of the said association, at the office and place of business of the association, a copy thereof." The defendant Wolluter now applied to the Court to set aside this judgment on the grounds: (1) that he had been served with no copy of the summons, and the service upon his co-defendant Rothschild, one of the partners in the association, was bad and insufficient in law; (2) that the sheriff's return was wrong, inasmuch as at the time of service of the summons the

1884.
March 5.
Wolluter vs.
Foote.

1884.
March 5.
Wolluter vs.
Foote.

association had no "office or place of business" as in the return set forth; (3) that the applicant had a good and substantial defence to the action, inasmuch as the plaintiff, now respondent, had neglected his duty as secretary to the association by not keeping proper books, and had thus rendered it impossible to wind up the business. In support of the application, Mr. Wolluter made an affidavit in which he stated that he had received no copy of the summons in the action, and the first intimation he had received that judgment had been given against him was contained in a letter sent him on the following day, February 22, by the plaintiff's attorney. He had a good defence to the action inasmuch as Foote, in his capacity as secretary to the association, had failed to keep proper books, and it was consequently impossible for the members of the association to ascertain their financial position. In the month of February, 1883, Messrs. Martell and Rogers had been appointed to audit the books, and the said Martell had informed the applicant that, owing to the negligent and unbusinesslike manner in which the books had been kept, it was impossible to prepare a proper statement of the affairs of the association. He added that at the time of the service of the summons on Rothschild the association had no office or place of business. An affidavit was also filed by Mr. Martell, who stated that he was a book-keeper of twenty years' experience, and was now in the employ of Mr. A. A. Rothschild. In or about February, 1883, he and Mr. Rogers (who had since left Kimberley) were requested to audit the books of the association and to strike a balance sheet, and the books were handed to him by Foote, and the entries in them were in his handwriting; on examination of the books "it was evident that large transactions had taken place between the said association and other persons, but that no proper books had been kept to enable us to make out a statement shewing the financial position of the association or the position of the several members thereof one with the other."

In reply to those statements a long affidavit was sworn by the respondent, in which he stated that the association in question was formed for the purpose of coal-mining, and the

works and operations of the partnership were carried on principally in the Orange Free State, the financial portion of the business being transacted in Kimberley. The association at one time had its own offices, and subsequently used the private office of the deponent, but about the month of March, 1883, the books had been deposited by him with Mr. A. A. Rothschild, the chairman of the association, and had since then been kept at his office, where the defendants had held all their meetings, and all business connected with the partnership had been transacted; so lately as two days ago the deponent had been called in by the chairman to discuss matters concerning the partnership at such office. He annexed a letter from his attorney to Mr. Rothschild, inquiring at what place the business of the association was carried on in Kimberley, and where service of summons could be effected, and a reply from Mr. Rothschild stating "that several of the last meetings of the association have been held at my office as chairman, that I hold some of the books and vouchers, and that I know of no other office or place of business in Griqualand West where the business of the association is carried on." Mr. Foote then proceeded to refute in detail the allegation that he had failed in his duty as secretary by not keeping proper books, and explained that the difficulty in auditing the books and making out a statement of the affairs of the association had arisen through no default on his part, but solely owing to the fact that notwithstanding all his exertions it had been impossible to procure full accounts of the operations which had been carried on on behalf of the partnership by two of its members, Messrs. Hollins and Holder, in the Free State. He annexed numerous documents, extracts from minutes, correspondence, &c., in support of these statements. He had spent much time and labour in endeavouring to float the partnership as a joint-stock company, had advanced large sums for the purposes of the business, and after frequent conferences with the auditors on the subject of the accounts of Hollins and Holder, and repeated requests to those gentlemen for further information, which had not been supplied, he had prepared an approximate balance sheet, shewing their liability to the association as far as could be

1884.
March 5.
—
Wolhuter vs.
Foote.

1884.
March 5.

Wolhuter vs.
Foote.

gathered from the accounts which had been furnished. No complaints of any kind had ever been made against the way in which he had discharged his duties as secretary until the allegations contained in the affidavit of the present applicant were made. On November 15, 1883, he had caused a letter of demand to be addressed to the applicant as well as to the other members of the association, but to this no reply had been received. Affidavits were also filed by Messrs. Heckrath, Symons, and Ward, co-defendants of the applicant, in which they stated that the respondent had repeatedly complained at the meetings of the association that, owing to the inadequate explanations supplied as to the state of the accounts of Messrs. Hollis and Holder, it was impossible to properly keep and complete the entries in the books of the partnership; that, with this unavoidable exception, the respondent had kept all proper books and made all entries that were possible, that he had discharged his duties as secretary in a thoroughly efficient manner, had shewn himself zealous and indefatigable in promoting the interests of the association, and had devoted much time and money to that purpose. There was also a supplementary affidavit by Foote, stating that he was still secretary to the association, and had never been discharged from his employment in that capacity.

There was a replying affidavit from Mr. Wolhuter, in which he stated that, although meetings had been held at Rothschild's office, and the books had been kept there in the hands of Martell, Rothschild's book-keeper, as auditor, the office had never been constituted the office of the association. He added that he had himself frequently complained to the respondent of the irregularity of his book-keeping, and it was in consequence of such irregularity that the books had been placed in the hands of auditors. Mr. Martell also made a further affidavit, mentioning various respects in which the respondent's book-keeping had been irregular and inadequate. He had prepared and put together from the papers supplied by the respondent to him as auditor an account, which he annexed, shewing the transactions with Hollis and Holder, and these accounts should have been entered in the books as they were received. The

approximate balance sheet referred to by the respondent had been made out by the auditors in part from verbal information supplied by the respondent, as many of the items contained in the statement did not appear in the books of the association at all. He further stated that the books were handed to himself by Foote to be audited, and were never handed to Rothschild, but were kept by deponent for convenience sake in his office.

1884.
March 5.
Wolhuter vs.
Foote.

On these affidavits,

The COURT intimated that it would like to hear the evidence of Rothschild, and it was accordingly arranged that Mr. Rothschild should attend for examination at the afternoon sitting, when he gave the following evidence :—

By the COURT :—I am chairman of this association. The last meeting was a directors' meeting, six or eight months ago, at my office. There have been three or four such meetings. I should say the place of business was at my office, meetings were held there. I know of no other office; as they had none I lent mine. Wolhuter was at one meeting at my office. There was one meeting at Haarrhoff's, but I don't think that had anything to do with the association; it was a private meeting to discuss pending legal proceedings. I had no objection to service of this summons at my office. I don't know where the secretary did his business; it was not at my office. The books were handed over to me by the secretary for safe keeping. The books had been at my office for six or eight months. They were subsequently handed over by me to the auditors; they remained in my office. The association transacted business. Formerly the secretary had an office of his own, the other side of the street. I can't say whether the name of the business was put up at the secretary's office. When I got this summons I took no steps, and didn't communicate with my partners.

By *Hoskyns, C.P.*:—There were meetings at Symons's office before I joined the association. The convening notice said where the meeting would be. I presumed the other partners were similarly served with me in this case.

1884.
March 5.
—
Wollhuter vs.
Foote.

By *Forster* :—Since I joined the association, with the exception of one meeting at attorney Haarhoff's (which was informal and, I believe, called by Haarhoff himself), I believe all the meetings have been at my office. Since I joined the association I believe Foote has gone round and solicited orders. The business has been at a standstill for six or eight months, or even longer. Foote attended the meetings at my office as secretary. The partnership is not dissolved. I consulted Foote on a matter concerning the business last Saturday in my office. As far as I know, I corroborate the statements made by Symons, Heckrath and Ward, that they were satisfied with Foote's conduct as secretary.

Hoskyns, C.P., for the applicant, contended that service on Rothschild at his office was inadequate, as that office was not the place of business of the association. The company had no place of business, and the mere fact that the books were kept at Rothschild's for safety and for audit did not make that the place for service of process. He referred to the rules as to service of summons, which it was important should be strictly enforced, and cited *Voet*, ii. 4, 14. It was clear that judgment had been given by default without any notice whatever, either actual or constructive, to the applicant. All the partners ought to have been served, and the only course now was to set aside the proceedings as defective and begin *de novo*. If, as in this case, a defendant had no notice of an action to which he had a good defence he was entitled to relief. There was a good *prima facie* defence disclosed on affidavit, for if Mr. Foote had not done his work he was entitled to no salary, and the claim for commission was challenged altogether. The books did not shew the sale of the coal for which the commission was charged. Until it could be ascertained what money had been expended, the secretary had no right to claim anything at all. He contended on the merits that the ground set up was not one for a reconventional claim, but for a defence to the plaintiff's demand. As to some of the partners being satisfied, that did not affect the present applicant, who was entitled to set up any defence he might be able to substantiate. The Court could not determine at the present stage who would succeed, but there had been no neglect or delay on behalf of the

applicant, and sufficient cause for re-opening the case had been shewn. The applicant should not be compelled by a judgment obtained behind his back to pay for work which he said had never been performed, or for commission which he said was not due.

Forster, for the respondent, observed that the applicant had been repeatedly asked by letter to settle this claim, but he never took any notice or brought forward the present counter-claim. As to the service, he submitted it was clearly shewn that Rothchild's office was the place where the association conducted its business. The argument for the applicant was in effect that, because the association had no office with its name painted outside, it had no office at all. There had been no business carried on in Kimberley, except at the meetings of the partners at Rothschild's. The books were kept there, and the partners could not profess ignorance of anything that took place there. He referred to *Re Family Endowment Society*, 5 Ch. 118. It was clear that the chairman regarded his office as the place of business; he said so in his letter to the plaintiff's attorney, and he accepted service there, and gave evidence in the box to the same effect. All the reported cases turned on what was meant by a place of business; *Vos vs. Vos*, 1 Menz. 132. The very fact of the existence of the partnership implied the existence of a place of business. Rothschild was the proper person to serve, and if the other partners suffered through his not giving them notice of the summons they had their remedy against him, and were not entitled to plead ignorance of the proceedings. As to the grounds for re-opening cases and setting aside judgments, he referred to Rule of Court 329, section (e), Tennant's edition, p. 182. The present affidavits disclosed no defence whatever to the plaintiff's claim. The respondent admitted that the books had been irregularly kept, but this was owing to the nature of the company's operations, and it was impossible to keep them otherwise, as had been fully explained by Foote. In point of fact, the books did shew the sales and all other transactions that had passed through Foote's hands. Wolhuter had allowed a year to elapse before he made these allegations, and the charges he now brought were explicitly denied, not only by

1884.
March 5.
Wolhuter vs.
Foote.

1884.
March 5.

Wolhuter vs.
Foote.

Foote, but by the chairman and three other partners in the association.

Hoskyns, C.P., in reply:—The respondent's contention comes to this, that "where the books of a company are kept, there must be its place of business." In the present case the books were kept at Rothschild's merely because the auditor happened to be Rothschild's book-keeper. It was clearly the duty of the plaintiff, having regard to the fact that he was himself the secretary of the association, to serve all the partners. The whole proceedings were bad, for want of due service, or at all events a strong case for re-opening had been made out.

LAURENCE, J.:—This matter has been argued very vigorously, and the case is certainly one of some difficulty. It is one in which it is possible that a decision either way may be a source of some hardship to one or other of the parties. On the one hand, the respondent's claim is for a specific sum alleged to be due to him by way of salary and commission, and against this the applicant now sets up as a ground of defence that Foote has been guilty of negligence and misconduct in the discharge of his duties as secretary. Allegations of this kind are sometimes lightly made, but are not always so easy to prove, and, after the long delay which has taken place with reference to the settlement of Foote's claim, to allow the case to be re-opened, and this defence to be now set up, might entail considerable hardship. On the other hand, it is admitted that Wolhuter was not aware of the summons, and that he was only made aware of his alleged liability in the matter when he was called upon to pay shortly before action was taken. A letter was written to him on November 15th, asking for a settlement, and giving him notice that, if terms were not arranged within a week, Foote would take legal proceedings to recover the amount due to him. Wolhuter made no answer to this, and in the end the proceedings were taken, but of this he had no direct or actual notice. Having received no actual notice, can he be held to have had constructive notice, which would be legally equivalent to actual notice? If service was effected on his co-partner at the place of business of the Association, that

would amount to constructive service on Wolhuter himself. The practice in the Magistrate's Court, under Rule 11, Schedule B, to Act 20, 1856, is that service on one partner is constructive service on all the others, even if not effected at the place of business; but according to the practice of the Superior Courts such service to be valid must be at the place of business. Now the service was actually on Rothschild, who is a partner, and the chairman of the association, and it was effected at Rothschild's own place of business; but the question is whether that was the place of business, not of Rothschild, but of the association. It seems clear that at the present time either this association has no place of business at all, which is not to be presumed, or else its place of business is at Rothschild's office. Foote's attorney, Mr. Dewhurst, very properly wrote to Rothschild, inquiring at what place the business of the association was carried on at Kimberley, and where service of process could be effected. To this Rothschild replied, as chairman of the association, "several of the last meetings of the Association have been held at my office as chairman. I hold some of the books and vouchers, and know of no other place of business of the company in Griqualand West." Upon this information a summons was served on Rothschild at his office, and he accepted it. In the witness-box Mr. Rothschild has to-day confirmed the statements in his letter as to the meetings of the association having been held at his office, with the exception of one meeting of directors, which was convened at the attorney's office, and which was not an ordinary meeting of the association. He also stated that he had held the books of the association for six or eight months. When there is any doubt as to what is the place of business, or *siège sociale*, of a firm or partnership association, I think that the office where its books are kept ought *prima facie* to be regarded as such place. It has been said that the books were taken to Rothschild's merely for the purpose of being audited by his book-keeper, Martell, but, in my opinion the evidence rather goes to shew that the books were taken there in the first instance for safe keeping, when Foote left his office at the other side of the street. If they were taken

1884.
March 5.

Wolhuter vs.
Foote.

1884.
March 5.
Wolluter vs.
Foote.

there only for the purpose now alleged, how was it that they remained in Rothschild's possession, as appears from his evidence to have been the case, for some six or eight months before they were handed over to Martell for the purposes of audit? On these grounds I am of opinion that the preliminary objection to the proceedings should be overruled, and that the balance of evidence is in favour of the service having been duly made at the place of business of the company, and being therefore a service binding on the present applicant. If the chairman of an association of partners is summoned to appear, and chooses to take no notice of the summons, and fails to inform his partners, and they are thereby prejudiced, they may well have a remedy against him, but the rights of a plaintiff cannot be affected by such omission or neglect on the part of one of several co-defendants. Assuming then that the objection to the service has failed, the question remains whether sufficient grounds have been shewn for setting aside the judgment and re-opening the case under the 329th Rule of Court. This is a matter very much in the discretion of the Court. I do not think that the Court should lightly re-open cases in which a defendant has made default, and a judgment once given should not be set aside unless strong grounds are disclosed for doing so, on the merits of the case. In the present case I feel bound to say that the balance of evidence, on the facts now before us, is distinctly against the contention of Wolluter that he is entitled to resist payment of the amount of this judgment on the ground of negligence on the part of Foote. So far from the applicant being corroborated by his partners, who are equally responsible with him for the satisfaction of this judgment, the chairman of the association and three of the other partners express themselves as perfectly satisfied with the manner in which their secretary carried on the business, and with the zeal and diligence he displayed. The next question which presents itself to my mind is one the answer to which appears to be decisive against the present application. Would a refusal to grant this application entirely debar the applicant from raising the claim he now brings forward? I am of opinion that Wolluter has another

remedy, and that this in itself is a good ground for refusing to set aside the judgment. This is the view which was taken in the Court of Appeal in the case of *Murtha vs. Gates*, on appeal from this Court, where the CHIEF JUSTICE held that the applicant's proper course should have been not to attempt to set aside the judgment, but to bring a fresh action against Gates on the grounds set forth in his affidavit. In the same way, Wolluter can now bring an action against Foote for any damage he may have sustained, as a partner in this association, through the alleged negligence of Foote. I might also refer to the recent case in this Court of *Hofmeyr vs. Kruger and Verster* (*supra*, p. 8), where it was held on exception that a similar claim could be set up both by way of plea and by way of counterclaim. On these grounds I am of opinion that the service having been good, the balance of evidence as to the merits certainly not being in favour of the applicant, and the applicant having another remedy open to him, the present application ought to be refused.

1884.
March 6.
Wolluter vs.
Foote.

JONES, J.:—In this case the first question we have to consider is whether there has been proper service of the summons; secondly, if that is so, has the applicant shewn such a good *prima facie* ground of defence to the claim that the judgment should be set aside, and a new summons ordered to be issued? On the first point, I do not think there is sufficient evidence before us to shew that Rothschild's office was ever the place of business of the company. It appears to me that the books were merely carried over and deposited there for the purposes of safe keeping and auditing. What other business has ever been transacted there? It appears from the affidavits that the association for some time had their own place of business, and subsequently the secretary's private office became their place of business. There is nothing in the fact that some meetings were held at Rothschild's office to shew that the place of business was ever transferred thither. Hence it follows that the service at Rothschild's was not a service of process in accordance with the Rules of Court; and whatever Mr. Rothschild's opinion may have been as to where service

1884.
March 5.
—
Wolhuter vs.
Foote.

ought to have been made, we cannot be guided merely by his opinion, but must look at the rest of the evidence, which leads me to the conclusion that his office was not the place of business of the association. The applicant had no notice of the service of the summons, as Rothschild did not communicate it to him, thinking, as he tells us, that all the other partners had been personally served. Mr. Rothschild seems to have been accustomed to receiving such documents, and took no notice of it. Thus the present applicant has had no notice of any kind of the action brought against the association, and no opportunity, if he has any defence, of setting it up. I cannot see that he has been even constructively served with this summons. That being so, and the service being bad, it is really unnecessary to deal with the point as to whether the applicant has or has not disclosed a *prima facie* ground of defence. I must altogether decline to express any opinion as to the side on which the balance of evidence on the merits, as disclosed by the affidavits, appears to be. It is sufficient to say that the applicant has shewn probable grounds for defence, but whether he can establish them or not will be matter for decision on a future occasion. On the grounds of bad service, and of the existence of a probable defence, I think the Court is bound to allow the case to be re-opened and to give the applicant an opportunity of defending this claim. I think the judgment of the Court should be that the former judgment be set aside, and summons issued *de novo*, to be served on the several defendants within a month from the present date, the declaration to be filed in the usual way, and the defendants to have the usual time to plead. I think also that the applicant should be ordered to give security, to the satisfaction of the Registrar, in the sum of £660 for the subject matter of this action, and the costs both of the former proceedings and of those now to be taken.

BUCHANAN, J.P.:—This is an application to set aside a judgment obtained last month by the present respondent in an action in which he was plaintiff, and the present applicant, together with certain other persons, was defendant.

The judgment was obtained on motion through default of appearance, under the new Rules of Court, and it was for a considerable sum alleged to be due to the plaintiff, the secretary of a partnership known as the Orange Free State Coal and Iron Association, and said to carry on business in Kimberley and the Free State, for salary and commission and moneys advanced. The applicant and the other co-defendants are the partners in this association. It is now sought to set aside this judgment and allow the case to be re-opened on the grounds, firstly, that there was no proper service of the summons, and secondly, even if there was a technically sufficient service, that the applicant has a good ground of defence, arising out of the negligent manner in which the respondent discharged his duties as secretary, and this defence he ought to have an opportunity of raising and having investigated by the Court. The matter is one not free from doubt; it has been very fully argued, and no doubt it is a matter on which very forcible arguments can be urged on both sides. After the full judgments which have been already delivered, I do not think it necessary to say more than that, on the whole, I have arrived at the same conclusion as has already been expressed by my brother JONES. On the evidence before us, I think it cannot be held that Rothschild's office was the place of business of the association, and consequently there has been no proper service, and the proceedings ought to be set aside. As to the other point, the Court has only to find, before affording the relief now sought, that the facts set up would amount, if they can be substantiated on the trial, to a good defence. There can be no doubt that such is the case, especially when we consider the statements as to the respondent's book-keeping contained in the affidavits filed by Martell. The order of the Court will therefore be in the terms already mentioned by my brother JONES.

1884.
March 5.
Wolluter vs.
Foote.

On the application of *Hoskyns, C.P.*,

The COURT gave the applicant the costs of the present application.

Hoskyns, C.P., then submitted that, as the Court had found there had never been any service on Wolluter, and in

1884.
March 5.
—
Wollhuter vs.
Foote.

consequence he was not properly before the Court, he had not been in default at all. As the applicant had succeeded on the first point, the case was not re-opened and the judgment set aside, but the proceedings were really quashed *ab initio*, and therefore Wollhuter should not be put on terms at all. He contended that as the matter was to be begun *de novo*, there was no more ground for compelling Wollhuter to give security than for ordering Foote to do so ; but

The COURT declined to vary the terms of the order, as already stated.

[Applicant's Attorneys, PALEY & COGHLIN.]
[Respondent's Attorney, DEWHURST.]

ROSE-INNES DIAMOND MINING COMPANY, LIMITED, vs.
CENTRAL DIAMOND MINING COMPANY, LIMITED.

Contract for amalgamation of joint-stock Companies.—
Powers of Directors.—Ultra vires.—Consensus ad idem.
—Costs.

Two Mining Companies having entered into negotiations for the amalgamation of their holdings, the directors of the respective Companies were empowered, in accordance with the provisions of the trust deeds, to complete the amalgamation and arrange the details, on the basis of a scheme accepted by the shareholders of both Companies. A sub-committee was then appointed by each directorate to effect this object, and they entered into an arrangement, which was intra vires, as to one of the points requiring settlement on the aforesaid basis, in consideration of an arrangement as to another point, which was held to be ultra vires. The one Company attempted to enforce the contract for amalgamation (which had already been partially carried out), including the term of the agreement effected as aforesaid which was intra vires, but excluding the other : the other

Company pleaded that the contract included both the above terms.

Held, that, as the term which was intra vires was agreed to in consideration of that which was ultra vires, and as, with the exception of this arrangement, the directors had omitted to complete the amalgamation and arrange the details, as instructed by the shareholders, there had been no consensus ad idem, and there was consequently no completed contract between the parties.

Held also, that, while the defendant Company was entitled to absolution from the instance on the grounds set forth, as both parties had failed to prove their case, and were equally responsible for the failure of the negotiations, there should be no order as to costs.

This action arose out of certain negotiations for the amalgamation of the plaintiff and defendant Companies, both of whom were diamond mining Companies in the Kimberley mine. The declaration alleged that on or about August 1st, 1883, it was agreed between the two Companies that certain claim ground, the property of the plaintiffs, should be acquired by the defendants, and it formed a portion of the said agreement that certain high ground belonging to the plaintiffs, and standing in their claims above a certain level, and amounting to 110,000 loads or thereabouts, should be purchased by the defendants at the price of 5s. per load; the defendants were to take over the assets and liabilities of the plaintiffs, and the excess of liabilities over assets was to be deducted from the sum to be paid for the aforesaid high ground. The assets and liabilities were accordingly taken over, and the high ground transferred, and the net sum due and payable to the plaintiffs under the aforesaid agreement amounted to £21,987 6s. 7d., which the plaintiffs claimed, with interest and costs. The defendants pleaded that the agreement relied on by the plaintiffs contained provisions other than those mentioned in the declaration, viz., that the plaintiffs should pay the defendants a *pro rata* share of certain Mining Board promissory notes held by the defendant Company, diamonds in their possession, and cash in hand,

1884.
March 5.
„ 7.
„ 10.
„ 12.
„ 14.
May 8.

Rose-Innes
Diamond
Mining Co.
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

and amounting to the sum of £98,154, less certain liabilities to the amount of £40,000, and that the amount so to be paid by the plaintiffs was to be deducted from the amount now claimed, and the plaintiffs were to take the defendants' promissory note for the balance, with interest at the rate of six *per cent. per annum*, and payable eighteen months after date, and subject to certain conditions as to the payment of the note before maturity on certain events happening and the retiring of the note before the defendants declared any dividend, &c. The plaintiffs' *pro ratâ* share, under the amalgamation agreement, of the above-mentioned assets amounted to £11,240 8s. 7d., leaving a balance due to the plaintiffs of £10,746 18s., for which the defendants before action brought had tendered, and still tendered, a promissory note in terms of the agreement. The plaintiffs admitted the tender and joined issue on the rest of the plea.

From the evidence it appeared that the trust-deeds of both the plaintiff and defendant Companies contained the following provision:—"A full Board of Directors may at any time, upon such terms as they shall think fit, provisionally entertain proposals to amalgamate the Company with any other company, or partnership, or person, established for the same or similar purposes, and the directors may make proposals for that purpose provisionally, and such proposals when definitely arranged shall be submitted to a special general meeting convened for that purpose, and such special general meeting shall have the power to take into consideration any such proposals, and to conclude any final agreement or arrangement for such amalgamation, purchase, or acquisition, and to authorise the directors to arrange the details thereof." On June 28th, 1883, Mr. Tucker, the secretary of the Central Company, wrote a letter to the chairman and directors of the Rose-Innes Company, which was in the following terms:—

"Mr. English, one of the directors of this Company, has reported to the Board of Directors that he has ascertained from Messrs. Cowan and O'Leary that there is a desire on the part of your Company to amalgamate with the Central Company, and that the following terms have been arranged as a basis of negotiations:—Central scrip to be issued for 12½ claims at the rate of £8000 per claim. That measurement at a depth of 100 ft. below the level of the top of the hard rock shall be made, and that

should the extent of closing ground at that depth be greater than 12½ claims, then scrip shall be issued for such excess at the same rate. That the sum of 5s. per load shall be paid to the Rose-Innes Company by the amalgamated Company for all ground above the aforesaid level at which measurement shall be made. Machinery and rolling stock to be given in. The amalgamated Company to settle all liabilities of the Rose-Innes Company. All Mining Board paper held by the Rose-Innes Company to be taken over by amalgamated Company at par value as a set-off against the liabilities of the Rose-Innes Company. Discount to be allowed on all current paper, any balance between liabilities and Mining Board paper to be deducted from payment to be made on account of high ground. This proposition has been favourably received by the Board of Directors, who will appoint a committee to inspect the books of your Company in order to verify the returns and statements of yield from your ground, &c.; and, on the report of the committee proving satisfactory, they will be prepared to recommend to the shareholders the completion of the contemplated amalgamation; some delay will however be unavoidable, as a large number of the Central shareholders reside in England, and will have to be consulted."

At this time the Rose-Innes Company, which had never worked at a profit, had ceased working altogether, its claims being covered with reef, which it had no means of removing, and there was considerable fear of its being forced into liquidation by its creditors. The Central Company, on the other hand, was in a comparatively strong financial position, but the amalgamation was likely to prove beneficial to them, as it would give them a block of high ground to work in the event of their lower claims being covered with reef, while it would also increase their voting-power at the Mining Board, where representation was proportionate to the amount of claim-ground held by the various companies. The Central Company were also apprehensive that if they did not amalgamate with the Rose-Innes Company, the French Company might do so, and that this would prove prejudicial to their interests. On July 25th, a special general meeting of the Rose-Innes Company was held, at which the proposals contained in Mr. Tucker's letter were fully discussed, and in the end a resolution was unanimously carried, "That this meeting accepts the offer of the Central Company in terms of that Company's letter of June 28th, and hereby authorises and empowers the directors to complete the amalgamation of the Company's claims, &c., and sale of high ground." This resolution was communicated by Mr. O'Leary, the secretary.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 ———
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 —
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

and one of the directors of the Company, to the Central Company, who held a special meeting on August 1st, at which it was unanimously resolved, "That the action of the directors relating to the proposed amalgamation of the Rose-Innes Company with the Central Company be approved, on the basis agreed to by the shareholders of the former company, and the Central directors be empowered to carry the same into effect at as early a date as convenient." The directors of the two Companies thereupon proceeded, in accordance with these resolutions and the provisions of the trust-deeds, to complete the amalgamation and arrange the details. A good deal of evidence as to the details of the negotiations between the directors was produced and objected to on behalf of the plaintiffs, on the ground that the directors had no power to make any other arrangements in the matter than those embodied in the above documents; the COURT, however, admitted the evidence, JONES, J., *dissentiente*. After some weeks had elapsed only two matters remained in dispute, viz., the amount of the high ground for which the Rose-Innes were to receive payment, and a question as to whether the shareholders of the Central Company were entitled to retain their exclusive right to certain assets then in hand, consisting of certain blue ground, lumps, hardware and other stores, cash, diamonds (which had been shipped but not realised; owing to the depression in the market), and Mining Board bills. Most of these latter had matured, but had not been met, and were given partly for work done in removing reef and water from the mine, partly in satisfaction of certain claims for damages, for which the Central Company had obtained judgment in September 1882. The Rose-Innes directors, who were mainly represented in the negotiations by Mr. O'Leary, claimed that the blue, lumps, and stores, should go into the amalgamated Company, but do not seem to have thought that their shareholders would have a right to share in the other assets. On September 24th Mr. Tucker again wrote to the Rose-Innes Company, as follows:—"With reference to the measurement of the high ground, which necessarily calls for considerable reduction from the quantity given as *maximum* in the surveyor's report, on account of inequalities which are known to exist.

but which are unascertainable as to extent, I am directed to state that this Company is willing to arrange finally as for 90,000 loads, or otherwise to arrange provisionally for 75,000 loads, and leave any balance to be arranged for when the actual quantity can be positively ascertained. The assets due to shareholders of this Company you will see by reference to memo. attached." The "memo." shewed the following assets:—Mining Board bills, £74,749 6s. 1*d.*; diamonds, £19,824 10s. 6*d.*; cash, £3581 16s. 11*d.*; stock, hardware, &c., in stores, £10,247 13s. 10*d.*; blue on floors and lumps, £23,603 15s.; less liability at bank, £40,000; total, £92,007 2s. 4*d.* This letter and memorandum were discussed at a meeting of the Rose-Innes Company held on the same day, when it was proposed by Mr. Fenton and seconded by Mr. Hurley: "That the resolution of July 25th, accepting the offer of the Central Company to amalgamate certain property of the Rose-Innes Company with the Central Company, and for the purchase by the Central Company after such amalgamation of certain other property of the Rose-Innes Company, be strictly adhered to." To this resolution an amendment was proposed by Mr. McFarland, "That the letter and memo. of the Central Company of this day's date be referred to the directors, to be dealt with in terms of the resolution of July 25th, 1883." Mr. McFarland's amendment was carried as a substantive resolution, Messrs. Fenton and Hurley dissenting, and these gentlemen subsequently sent in a formal protest. The directors of the two Companies then resumed negotiations on the subjects mentioned in Tucker's letter, and on October 2nd Mr. O'Leary submitted a case for counsel's opinion as to whether in the circumstances the Central Company were entitled to retain their *blue, lumps* and *stores*, and adding that, even if they were, all the shareholders of the Rose-Innes Company, with the exception of Mr. Fenton, were anxious to complete the amalgamation, and inquiring how Mr. Fenton's opposition was to be got rid of. On October 8th a meeting took place between Messrs. Bottomley, English, Tracey and Benningfield, representing the Board of the Central, and Messrs. O'Leary and Cowan, representing that of the Rose-Innes Company. At this meeting it was ultimately agreed that

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

the quantity of the Rose-Innes high ground should be taken at 110,000 loads, that the Central should waive their claim to the blue ground, lumps, and stores, but that they should retain the other above-mentioned assets (amounting in all to £58,000), as to which however, instead of debentures being issued to the Central shareholders, it was arranged, apparently on a suggestion by Mr. O'Leary, that the Rose-Innes shareholders should pay for their *pro ratâ* share as members of the amalgamated Company, and this payment should be deducted from the payment to the Rose-Innes shareholders for their high ground, the balance to be paid them by a promissory note on the conditions set forth in the defendants' plea. A provisional scrip-certificate for the shares in the amalgamated Company to be held by the Rose-Innes shareholders was then handed over by Mr. Bottomley, as chairman of the Central Company, to Mr. Cowan. Mr. O'Leary said it would be necessary to obtain a ratification by the Rose-Innes Board of the arrangement thus effected, which would be "a mere matter of form;" but Mr. Cowan seems to have stated, although there was some conflict of evidence on the point, that it would also be necessary to obtain the consent of their shareholders, and that he doubted whether they would give such consent. After this meeting the Rose-Innes claims were transferred, and scrip in the Central Company (which retained its title) was given to the individual shareholders of the Rose-Innes Company, and in some cases transfers were subsequently effected. Meanwhile, on the following day, October 9th, a special meeting of the Rose-Innes directors was held, to which Messrs. O'Leary and Cowan reported what had been arranged, and it was resolved "That the offer of 110,000 loads quantity of high ground to be paid for by the Kimberley Central Company be accepted, and that the proportionate share of this Company in Kimberley Central Company assets of £58,000 be paid for out of price of high ground—always provided same is in accordance with opinion of Mr. Hoskyns." Mr. Hoskyns, to whom the case already mentioned had been submitted, on October 10th gave his opinion, which was substantially to the effect that the Rose-Innes shareholders were entitled on amalgamation to share in all the assets of the Central Company, equally

pro ratâ with the original shareholders. In consequence of this opinion at the next meeting of the Rose-Innes shareholders, which was held in December (one having been called in November, but not having been held owing to an informality in the notice), the directors entirely repudiated the agreement of October 8th, and it was resolved to sue the Central Company for the immediate payment of the sum due for the high ground, without the deduction for the *pro ratâ* share of Central assets acquired by the Rose-Innes shareholders, which the former Company claimed to be entitled to make. The other facts brought out in evidence, so far as material, will be found sufficiently set forth in the arguments and judgments reported below.

Hoskyns, C.P. (with him *Levey*), for the plaintiffs, observed that the defence had varied. At first it was apparently contended that the original agreement was ambiguous on the point now in dispute, but the witnesses for the defence held that there was no ambiguity, and that it was never contemplated that their assets in hand should go into the amalgamated Company. In that case the Central directors had no authority to give up part of their claim, and *vice versâ*, if the agreement was clear the other way, as the plaintiffs contend. The defendants had proved no variation of the original agreement; the scrip was delivered under the original contract, the directors at the time hoping to obtain the assent of the shareholders to the variation; but in this they failed. O'Leary and Cowan simply stated, at the meeting of October 8, that they were appointed by the directors to settle the matter in terms of the instructions given by shareholders. The letter of June and resolution of July must be taken to be an offer and acceptance of a *societas universorum bonorum*. Clause 9 of the Central trust-deed provided that in the event of an amalgamation, the amalgamated Company "shall receive shares in like manner as the original promoters, and have and be entitled to the same privileges as they, the original promoters, have and are entitled to under these presents." There was really no dispute as to details of measurement &c., and the contract was completed by the resolution of the Central Company of August 1.

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

Forster (with him *Davison*), *contra*:—The defence is that it makes no difference whether an agreement, which culminated on October 8, was effected or not. If there was an agreement, the scrip was handed over on the basis agreed on on October 8: if there was none, there was no contract on which the plaintiffs can recover. The defendants have acted on an agreement by which, even if *ultra vires*, they have been put to expense; and the plaintiffs have been benefited by the removal of reef from their high ground, &c., and they cannot now be reinstated. The plaintiffs declare on a contract, but repudiate the contract into which the defendants entered, and on condition of which they handed over scrip and accepted transfer of the claims. The defendants are entitled to demand proof of the contract; if the parties were never at one until a certain date, and the proceedings at that date were *ultra vires*, then there was no *consensus*, and the action must fail. The defendants were quite justified in their view that the assets in question, not being specifically mentioned, were not included in the proposal of June 28, at which time the Central were in a strong position, while the Rose-Innes were practically bankrupt. It is submitted that the Rose-Innes shareholders, by their resolutions of July 24 and September 24, did empower their directors to effect this arrangement. The only assets which they ever claimed, as appeared from the case for opinion, were the blue, lumps and stores, on which the defendants gave way. The defendants passed scrip and took transfer of the claims without any intimation being made to them that the carrying out by the Rose-Innes of the arrangement of October 8 was to be subject to the approval of counsel. That arrangement was the only contract to which the defendants ever agreed and which could be binding on them; it was only at this meeting that the number of loads and the terms of payment were fixed. The Central never had any notice of repudiation till December 4, and at the meeting of the Rose-Innes shareholders of December 14 no attempt was made to obtain their assent to the arrangement of October 8, but the reverse; and the report then presented, for which O'Leary was responsible, did not present a fair account of the negotiations with the Central, or suggest their ratification. The agree-

ment of October 8 and the minutes of the Board meeting of October 9 were never brought to the notice of the shareholders. Our contention is that the Rose-Innes shareholders gave their directors authority on September 24, on which they acted, and came to an agreement with us; they took our scrip and benefited by the work we did; *Brice on Ultra Vires*, 767-9. If the terms of the agreement of October 8 were *ultra vires*, there is no completed contract on which the plaintiffs can recover.

Hoskyns, C.P., in reply :—The defendants seem to rely on the resolution passed at the Rose-Innes meeting of September 24, but there is no proof that this was a special meeting properly convened for that purpose, in accordance with the terms of the Company's trust-deed. This resolution, however, only gives the directors power to act "in terms of the resolution of July 24," on which we are thus thrown back. The scrip was handed over on October 8, as appeared from Tucker's letter of that day, independently of the "final settlement of details" then arrived at; and this was in accordance with Cowan's recollection of his conversation with Bottomley at the time. It cannot be said that the assets now in dispute were excluded from the original proposal made by the defendants, who knew at the time of making it that they possessed them. No doubt such conversations took place as the witnesses described; but they had no binding effect, and the plaintiffs relied on the agreement disclosed by the documents. The defendants' version of what they intended and understood was inconsistent with common sense and with the conduct to be expected from men of business.

Cur. adv. vult.

Postea (May 8),—

JONES, J., said :—I regret that in giving judgment in this case the parties have not the advantage of hearing from the lips of the Judge President the grounds upon which he has arrived at the conclusion which now forms the judgment of this Court. I need not mention the reasons which have prevented this, as they are well known to those who practise

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, rs.
Central Dia-
mond Mining
Co., Limited

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

here. (a) In some respects I know that the reasons upon which I base my judgment are not those of my Lord, and therefore to myself it is a matter of regret that the parties to this action have not the benefit of hearing the grounds of his judgment. The plaintiff Company allege in their declaration that, on or about the 1st of August, 1883, it was arranged and agreed between the Rose-Innes Diamond Mining Company and the Central Diamond Mining Company that certain properties of the plaintiff Company should be acquired by the defendant Company, and that it formed a portion of the agreement that certain high ground consisting of diamondiferous soil, belonging to the plaintiff Company, and standing in their claims above the level of 100 feet below the top of the hard rock, and amounting to 110,000 loads of 16 cubic feet or thereabouts, should become the property of the defendant Company, and that the defendant Company should pay for it 5s. per load of 16 cubic feet. It is further alleged that at that date, there being certain debts due by the Kimberley Mining Board to the plaintiff Company, and certain liabilities due by the plaintiff Company to its creditors, it was agreed that the assets and liabilities should also be taken over, and the excess of liabilities over assets should be deducted from the sum to be paid to the plaintiff Company; that this excess was £5512 13s. 5d.; that the assets and liabilities were taken over by the defendant Company; and the possession, ownership, and control over the high ground was transferred to them; that the sum remaining still due, viz.:

£27,500	0	0
less	5,512	13 5

is £21,987 6 7;

and this sum the plaintiff Company claim, together with interest *a tempore moræ* and costs of suit, and such other relief as to the Court may seem fit. An account was annexed setting out the assets and liabilities. The defendants filed their plea; but during the trial various amendments were allowed. At the close of the hearing the defendants' pleas were in effect as follows: the defendant Company admits the

[(a) The JUDGE PRESIDENT had been compelled to leave Kimberley owing to a domestic bereavement. —ED.]

capacity of the plaintiffs as trustees and their right to sue; that the assets and liabilities of the plaintiff Company were taken over, and the transfer of the possession and ownership of the high ground; but they say that the agreement referred to in the declaration contained provisions other than those therein mentioned, namely, that the plaintiff Company should pay to the defendants a *pro rata* share of certain Mining Board promissory notes held by the defendant Company, diamonds in their possession, and cash in hand amounting to the sum of £98,154

less certain liabilities of defendant Company 46,000

£58,154;

that the *pro rata* share of this sum should be deducted from the amount claimed by the plaintiff Company in this action, and the balance due be paid by the defendants' promissory note, payable 18 months after date, subject to certain conditions which I need not now mention. The defendants further say that the amount of the *pro rata* share of the sum of £58,154, payable by the plaintiff Company to the defendant Company in respect of the agreement, is £11,240 8s. 2d., and that, therefore, the amount now due by defendant Company to plaintiff Company is £21,987 6 7

less 11,240 8 2

or £10,746 18 5;

and the defendants say that for this sum they tendered their promissory note before action brought, and the plaintiffs refused to accept it. By the plea the tender is repeated. To the plea is annexed a "Statement of Assets of the Kimberley Central Diamond Mining Company (Limited) on the 18th of September, 1883, as arranged with the Trustees of the Rose-Innes Diamond Company (Limited)," shewing the manner in which the sum of £11,240 8s. 2d. is obtained. The tender is admitted by the replication, and the other allegations are denied. In dealing with the facts of this case, I need not go further back than the 28th of June, 1883. Previous to that date there had been some informal and unofficial negotiations between the directors of the two Companies which ended in a letter being written by Mr. Tucker, the secretary of the defendant Company, to the

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.

Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

chairman and directors of the plaintiff Company. In this letter he says that "the following terms have been arranged as a basis of negotiations, viz.: Central scrip to be issued for $12\frac{1}{2}$ claims at the rate of £8000 per claim. That measurement at a depth of 100 feet below the level of the top of the hard rock, facing Road 6 North shall be made, and that should the extent of claim ground at that depth be greater than $12\frac{1}{2}$ claims, then scrip shall be issued for such excess at the same rate as above mentioned. That the sum of 5s. sterling per load of 16 cubic feet shall be paid to the Rose-Innes Company by the amalgamated Company for all ground above the aforesaid level, at which measurement shall be made. Machinery and rolling stock to be given in. The amalgamated Company to settle all liabilities of the Rose-Innes Company. All Mining Board paper, held by the Rose-Innes Company, to be taken over by Amalgamated Company at par value as a set-off against the liabilities of the Rose-Innes Company, discount to be allowed on all current paper. That any balance between liabilities and assets over Mining Board paper shall be deducted from *payment to be made on account of high ground.*" (It will be seen that no other deductions are mentioned or alluded to.) The letter goes on to state that this proposition has been favourably received by the Board of Directors of the Central Company, who will appoint a committee to inspect the books of the Rose-Innes Company in order to verify returns and statement of the yield from ground, &c., and on the report of this committee proving satisfactory, they will be prepared to recommend to the shareholders "*the completion* of the contemplated amalgamation; some delay will, however, be unavoidable, as a large number of the Central shareholders reside in England, and will have to be consulted." On the 5th of July Mr. O'Leary, the secretary of the Rose-Innes Company, informed the secretary of defendant Company, by letter, that this proposal met with the approval of his directors, and that a meeting of shareholders would be called for the 25th of July. On the 25th of July Mr. Tucker writes to the plaintiff Company that the result of the inspection of their books is satisfactory, and suggests that, "should the *terms of amalgamation* be accepted by the *shareholders of the Companies*, the *completion* of the transac-

tion be left in the hands of the directors of the two Companies." Upon that day the meeting of the plaintiff Company's shareholders was held, and upon the 26th of July O'Leary writes to the defendant Company that he is instructed to inform them that, at the special general meeting of shareholders of his Company, held on the previous day, the following resolution was carried unanimously, viz.: "That this meeting accepts the offer of the Kimberley Central Company, in terms of that Company's letter of June 1883, and hereby authorises and empowers the directors to *complete the amalgamation* of the Company's claims, &c., and sale of high ground." At the same time he requests, for the benefit of some doubting shareholders, "a clear explanation of the point that your (the Central) Company, in taking over this Company's liabilities, have not considered this Company's share of the Mining Board debt as a liability to be paid for out of the price of the high ground." It is hardly necessary to remark that in the terms proposed on the 28th of June, it had been specially mentioned that any balance between the liabilities and Mining Board paper was to be deducted from the payment to be made on account of high ground. At the meeting on the 25th of July, Mr. English, as a shareholder in the plaintiff Company, was present. On the 1st of August, the meeting of the shareholders of the Central Company was held, when Mr. English proposed "that the action of the directors relating to the proposed amalgamation of the Rose-Innes Company with the Central Company be approved of, on the basis agreed to by the shareholders of the former Company, and that the directors *be empowered to carry the same into effect*, at as early a date as convenient." This was carried unanimously. On the 1st of August, therefore, the shareholders of both Companies had consented to a certain basis of agreement, the terms of which appear to me to be sufficiently clear and unambiguous. The Rose-Innes shareholders had accepted the offer of the Central Company in terms of that Company's letter of the 28th of June, 1883, and had empowered the directors to complete the amalgamation of the Company's claims and sale of high ground. And the shareholders of the Central Company had approved

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.
Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.

Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

of the action of their directors, who had made this offer to the Rose-Innes Company, on the basis agreed to by the shareholders of the Rose-Innes, and empowered their directors to carry the same into effect at as early a date as convenient. The directors of both Companies had power to arrange matters of small detail, and to carry out the terms of the arrangement, but had no power to vary these terms; they were to adhere to the basis. Whatever arrangement they made could only be upon the basis of the letter of the 28th of June, unless they obtained further powers from the shareholders. The shareholders and directors of the two Companies were acting at these meetings of the 25th of July and 1st of August in accordance with their trust-deeds, both of which contain clauses to the same effect, namely, "that a *full Board* of Directors may at any time, and upon such terms as they shall think fit, provisionally entertain such proposals to amalgamate the Company with any other Company or partnership or firm established for the same or similar purposes, and the directors shall make proposals for that purpose provisionally, and such proposals when *definitely arranged* shall be submitted to a special general meeting of shareholders to be convened for that purpose, and such special general meeting shall have power to take into consideration any such proposals, and to conclude any final agreement or arrangement for such amalgamation, purchase, or acquisition, or to authorise *the directors to arrange the details thereof*." If therefore the directors of the two Companies met and entered into an agreement which was inconsistent with the terms of this letter of the 28th of June, I take it that they would be acting *ultra vires*. The defendant Company admits the general outline of the plaintiffs' claim, which appears to me to be not inconsistent with the terms stated in the basis agreed upon; but further terms are said to form part of the contract made between the two Companies. If the further terms are made by the directors as representing their Companies, we must consider the powers conferred upon these agents by their shareholders. In order for the defendants to succeed they must shew that the agreement entered into by the directors after the 1st of August was within the authority granted to them at the meetings

of shareholders held on the 28th of July and 1st of August, in accordance with the trust deeds, or, if the defendant Company failed in this, they must shew that on some subsequent occasion additional authority was given. During August very little was done, though there appear to have been frequent unofficial meetings between the directors of the two Companies, and strong expressions of opinion fell from Mr. O'Leary. These do not really affect the question between the parties. On the 24th of September, the only matters of detail left in dispute, between the members of the two Boards, were the amount of high ground, the question whether the Central Company was entitled to exclude the Rose-Innes Company from a share in certain of the assets then in hand, blue ground, lumps, hardware stores, diamonds, in the hands of the London agents of the Central Company, and Mining Board paper. All these assets were at first claimed by the Central Company as not falling within the terms of the letter of the 28th of June, and as being the exclusive property of the shareholders of the defendant Company. With this claim I shall deal later on in considering the proper construction to be placed upon the terms of the letter of the 28th of June. In September Mr. Tucker surveyed the high ground, and measured the plaintiff Company's claims 100 feet below the hard rock. No evidence was given upon the nature of Tucker's measurement, and the only information before the Court is to be found in the letter of the secretary of the Central Company to the Rose-Innes Company, dated the 24th of September. That letter is as follows: "I am instructed to inform you that the directors of this Company accept the measurement of your claims by Mr. Surveyor Tucker as correct, and that they will be prepared to issue scrip of this Company on that basis (provisional until new scrip can be obtained from England), 13 claims and 762 square feet. With reference to the measurement of the high ground, which necessarily calls for considerable reduction from the quantity given as maximum in Mr. Tucker's Report, 1,155,814.55 cubic feet, on account of inequalities which are known to exist, but which are unascertainable as to extent, I am directed to state that this Company is willing to

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

1883.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

arrange finally as for 90,000 loads, or otherwise to arrange provisionally for 75,000 loads and leave any balance to be arranged for when the actual quantity can be positively ascertained. The assets due to shareholders of this Company you will see by reference to memo. attached." In this memo. we find Mining Board bills, £74,749 6s. 1d., besides diamonds, cash, stock, hardware, blue on floors, &c., amounting in all to £132,007 2s. 4d., less liability at bank, £40,000, leaving a balance of assets of £92,007 2s. 4d., belonging to the Central Company, from all participation in which the Rose-Innes Company (if the defendants' first contention be correct) were to be excluded. In this letter we see two matters clearly, viz. that upon the 24th September there was no dispute about the measurement of the Rose-Innes claims; and, secondly, that no definite arrangement had been arrived at between the directors of the two Companies as to the number of loads of high ground. The little matter of £92,007 is, like the scorpion's sting, put in the tail of the letter. On the same day the Rose-Innes Company held their general meeting of shareholders. I need not comment upon the discussion which took place. It is sufficient for me to state the conclusion at which the meeting arrived, viz.: "That the letter and memo. of the Central Company of this day's date be referred to the directors to be dealt with in terms of the resolution of July 25th, 1883." Another resolution had been proposed by Mr. Fenton, but, though this would if carried have obviated much difficulty now, it was not carried. This resolution simply, in my opinion, throws us back upon the letter of 28th June, and the resolutions of the 25th July and 1st August. I consider that I am bound to interpret merely the written words of the resolution, and to give them their natural and ordinary meaning; I therefore do not inquire into the arguments of individual shareholders or their expressions of opinion. The directors must be guided by the written authority, if any, which they received, as expressed in the resolutions of shareholders actually passed. Subsequently to this date I do not find any further powers granted to the directors of the Rose-Innes Company. Early in the case I expressed my view that certain evidence was not admissible, and, though it was

admitted, I cannot help adhering to the opinion I then expressed, as I see no ground for changing it. I held that conversations between directors of one Company and the directors of the other Company were not admissible in evidence to bind the Company, when it was not shewn by evidence that the particular individual directors had been duly authorised to speak on behalf of their Companies. I shall therefore exclude, in giving my view of what I consider should be the judgment of this Court, that portion of the evidence. The evidence was tendered by the defendants for the purpose of shewing that on the 8th of October a certain meeting of O'Leary and Cowan on behalf of the Rose-Innes Company, and Bottomley, English and Benningfield on behalf of the Central Company, was held at the office of the Rose-Innes Company, and that it was agreed at that meeting that the additional terms mentioned in defendant's plea should be added to the arrangement set out in the letter of the 28th June. I held then that, unless the authority of the persons present to bind their respective Companies was previously shewn, any conversation between them or arrangements entered into were inadmissible in evidence. The ground upon which I founded my opinion was based upon the principle contained in *Holt's Case*, 22 Beavan, 48, and *Nicol's Case*, 28 L.J. (Ch.) 257, both cases cited in this Court in the argument on a similar point arising in the case of the *Consolidated Company vs. Cape of Good Hope Diamond Mining Company* (H. C. Repp., Vol. I., p. 438). *Brice* shortly states the principle in the following terms: "Either the representation or admission of the directors must be that of the directors, or a quorum thereof as a body, or if of one director, or other agent, some evidence must be given of the authority of such person to bind the company" (*Brice on Ultra Vires*, p. 613, 2nd edition). I adhere to the opinion I then expressed. At that time these directors had no more authority or powers than appeared in the resolutions I have already referred to, and I am of opinion that these powers did not enable them to vary the basis agreed to by the shareholders of the respective Companies on the 25th of July and 1st August. If it were, however, necessary to express my view as to what in fact did occur at the meeting on

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.

Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

October 8, I should hold that the directors present had their attention distinctly called to the fact that any agreement they might enter into would be *ultra vires* if it dealt with the assets of the Central Company. At this meeting, however, the question of the number of loads of blue ground for which the Rose-Innes Company should be paid was debated, and we are told that as a species of compromise a certain number was fixed, viz., 110,000, on consideration that the plaintiff Company would accept the terms mentioned in the defendants' plea. This meeting is the only one at which the number of loads was definitely arranged. If it be true that as a consideration for this agreement a *quid pro quo* was to be given, and that the surrender of assets was a matter outside the powers of the directors, we have an agreement bad because it was *ultra vires*. The one portion of the agreement—that as to the number of loads—must fall with the consideration for it, viz., the surrender of assets in which the plaintiff Company's shareholders would otherwise have participated. The plaintiff Company cannot now say, We will claim upon and declare for a certain number of loads definitely agreed upon, unless at the same time they tender the *quid pro quo* for that agreement. In coming to the conclusion that the directors acted *ultra vires*, I need not rely much upon the ground that the two directors of the Rose-Innes who were present do not appear to have been properly authorised by the directors of their Company as a body, nor upon the further objection that even if they were authorised it is exceedingly doubtful whether the Board could thus delegate its powers in view of the decision in *Cartmell's Case* (L. R. 9 Ch. 691), where it was held under the English Acts that, apart from some power to delegate, directors cannot delegate powers which they would not have possessed had they not been expressly conferred upon them; but I rest my judgment upon a close and careful scrutiny of the letter of the 28th June and upon what I deem a correct interpretation of the written words. Before doing so I may remark, *en passant*, that even the resolution of the Rose-Innes directors on October 9, 1883, after the negotiations of October 8 had been reported by O'Leary, would not fully ratify the acts of Messrs. O'Leary and Cowan. It was resolved by the

Board on the 9th October "that the offer of 110,000 loads, quantity of high ground to be paid for by the Kimberley Central Company, be accepted, and that the proportionate share of this Company in Kimberley Central Company assets of £58,000 be paid for out of price of the high ground, always provided same is in accordance with the opinion of Mr. *Hoskyns*." Mr. O'Leary tells us that before he went to the meeting of the day previous he had a verbal opinion from the *Crown Prosecutor*, and it is very probable that this was communicated to the Board, and hence the reservation at the end of the resolution. In any event the opinion when received must have shewn the Board clearly that they were not entitled to waive the claims of their shareholders without further powers from a general meeting. The construction which, I think, must be placed upon the letter of June 28 is that the Central Company offered *scrip* at the rate of £8000 per claim for $12\frac{1}{2}$ claims, but if the ground at 100 feet below the level of the hard rock should prove to be more than $12\frac{1}{2}$ claims, then scrip should be issued for such excess at the same rate; they further offered to pay 5s. per load for all the ground above the aforesaid level, at which such measurement should be made. For these benefits the Rose-Innes were to give up their claims, blue, machinery, rolling stock, &c., and their Mining Board paper was to be taken over at par value as a set-off against the liabilities of the Rose-Innes Company, discount to be allowed on current paper, and any balance between liabilities and Mining Board paper to be deducted from payment to be made on account of high ground. For what they got the Central were to give *scrip*. It was agreed on the 24th of September that the Rose-Innes Company were entitled to scrip at £8000 a claim for 13 claims, 762 square feet. Now, what does this scrip include? In my own opinion, though the view is not fully shared in by the Court, the words used in that letter could only convey one meaning to the Rose-Innes shareholders if read literally and in the natural or ordinary sense of the term, viz., that the Central would give shares to the nominal value of the claims mentioned at £8000 a claim, or about 11,000 odd shares of £10 each in the Company, and that these shares would give the holder a full share in all the assets of

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

the Company, without any reservation whatsoever. In telegraphing to Mr. Baring-Gould in England, the Central Company did not place any other construction on the words. After mentioning the terms they say—"Liabilities (that is of the Rose-Innes Company) about £32,000. Assets in Mining Board paper, £25,000, to be taken over by new Company. Most strongly advise you to accept the proposal, to frustrate machinations of the French Company, who are here seeking to oppose us. Balance of £7000 liabilities over assets to count against purchase of high ground, which is estimated at about 100,000 loads." The important item of £92,000 of assets in the Central Company, which the directors contended was not covered by the scrip to be issued, is never mentioned. Surely the directors of the Central Company knew of the existence of this item, and must have been aware that if they issued scrip of the nominal value of £110,340, that these assets would become to a proportionate extent the property of the new shareholders. If it was their intention to exclude these assets, why did they not state the fact? I listened carefully to the explanations which were attempted by the directors called into the witness-box, and I confess that they seemed most unsatisfactory. It was said amalgamations had been made previously in which assets of this character had been excluded. A reference was made to the terms of the trust deed, and it was shewn that the capital of the Company was calculated upon a somewhat similar basis, but it was at once admitted that every shareholder, though the nominal value of his share was calculated in this manner, or on a basis of so much per existing claim of the Company, was and always had been a part proprietor in the machinery and all the assets of the Company. If the holders of the new shares were not to participate in these assets, it would have been only fair and just to those who were expected to accept the Central Company's offer to tell them so at once—to tell them, in fact, that, if they accepted £110,340 worth of shares in the new amalgamated Company, £92,000 of the existing assets would be reserved for the old shareholders, that new scrip to this extent would have to be issued to the old shareholders of the Central Company, or that from the price

which the Rose-Innes Company were to receive for their high ground a sum would be deducted equivalent to the proportionate share which they would receive in these reserved assets. Certainly the shareholders in the two Companies, when their consent was asked to the terms stated by the Central Company, would hardly be expected to evolve out of their inner consciousness the fact that the word scrip in this particular instance had a special and original meaning—a meaning which was thoroughly understood by the directors themselves, but one which would by no means be a natural one for a shareholder to perceive. If this be so, then the Board of Directors which was empowered to treat upon this basis was not entitled to give up the Rose-Innes Company's share in a large amount of assets. This was adding a term not contemplated in the original agreement or basis of agreement. The contract alleged in the defendants' plea cannot be supported, because it was unauthorised. On the other hand, the plaintiff has declared upon a special contract, in which he alleges that a specific number of loads was agreed upon between the two Companies, and that this agreement was made on or about the 1st of August. It is clear that no such definite arrangement was made on the 1st of August, though upon that date the directors were empowered to carry out the amalgamation upon a certain basis perfectly consistent with such an agreement. From Mr. O'Leary's evidence it appears that Tucker's survey was not complete at that date, and I have already pointed out that on the 24th September the amount of high ground had not been determined. If the amount were fixed at *any* time it must have been at the meeting on the 8th October, and then merely as a compromise, other conditions being added as a *quid pro quo* for the concession as to the number of loads. Can the plaintiff Company then recover the value of the high ground in this action? I regret that I have been obliged to come to the conclusion that the plaintiff Company must fail. On the 8th October, after the agreement had been made between the directors, Mr. Bottomley handed over Mr. Tucker's letter of the same date to Mr. O'Leary. With that letter was handed a certificate of eleven thousand and thirty-four shares of the Central Company at £10 each,

1884.
March 5
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.

Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

in accordance with the agreement between the two Companies, "in satisfaction," as it is expressed, "of certain claims handed over and transferred to the trustees of the Central Company," and subdivided scrip was subsequently supplied, and the recipients of this subdivided scrip have since dealt with their shares, and in some instances transferred them to others. We have not now to settle the respective rights of these shareholders or of the two Companies. We have merely to deal with the claim set up in the plaintiffs' declaration and with the pleas of the defendant. The plaintiff now attempts to enforce, not the terms contained in the letter of the 28th of June only, but tries to take advantage of the agreement entered into between the directors of the two Companies in so far as it is not *ultra vires*. But if the Rose-Innes Company allege *ultra vires* at that meeting, the whole of the contract entered into must be treated as null and void. In consequence of this agreement between certain members of the two directorates, the certificate of scrip was handed over, transfer was made of the claims, and possession of the ground was delivered, &c. No doubt the object of those present at the meeting of the 8th October was to force through amalgamation—to secure advantages for both Companies. If they have failed in this respect it is their own fault—not the fault of the directors of one Company more than that of the directors of the other. The plaintiff Company must, therefore, fail to recover in this action; but as the fault is not that of the one Company more than that of the other, each Company will have to bear its own costs of suit. The form of the judgment will be absolution from the instance, but no order as to costs.

LAURENCE, J. :—This action arises out of certain negotiations for the amalgamation of the plaintiff with the defendant Company, under the provisions of their respective trust deeds, which took place between June and October last year. The plaintiffs allege that the amalgamation was effected on certain terms and conditions, under which a sum of £21,987 6s. 7d. is now due and payable to them as representatives of the shareholders of the Rose-Innes Company. The defendants admit in substance the terms alleged by the

plaintiffs, but say that it was a further condition of the agreement that the plaintiffs should pay into the amalgamated Company a sum equal to their *pro ratâ* share of certain assets which the Central Company had in hand at the time of the amalgamation, that this sum was to be deducted from that due to the plaintiffs, leaving a balance in favour of the latter of only £10,746 18s.; that it was further agreed that this balance should be paid to the plaintiffs not in cash but by a promissory note, subject to certain conditions, and that they have already tendered, before this action was brought, and still offer and tender such promissory note as aforesaid, which the plaintiffs refuse to accept. The questions we have to determine are whether the plaintiffs' or the defendants' version of the agreement is correct; if neither is correct, what was the actual agreement, or was there any completed arrangement at all? This much I think it necessary to say, although I will not dwell upon the point, that the whole dispute appears to have arisen from the lack of business-like accuracy and precision on the part of men—directors of large companies and representatives of powerful interests—from whom we have a right to expect the display of such qualities; if they had acted in the matter with ordinary caution and method this amalgamation—which, after all, was not such a very difficult or complicated matter to arrange—would have been settled, one way or the other, long since, and all the delay and expense of the present litigation would have been avoided. The fact is the matter seems to have been pushed forward—principally by Mr. O'Leary on the part of the plaintiffs, and Mr. English on the side of the defendants—with much more haste than caution, owing to a feeling on both sides that the important thing was to get the amalgamation through, and that the details of the arrangement mattered comparatively little. When in June 1883, after some preliminary *pourparlers* between the abovenamed gentlemen, the first official communication on the subject was made by the defendants to the plaintiffs, it is clear that both parties had very cogent reasons for desiring the amalgamation to take place. On the part of the Central the reasons were, so to speak, partly political. Under the new Mining Act, then about to come into force, by somewhat

1884.

March 5.

" 7.

" 10.

" 12.

" 14.

May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.

March 5.

" 7.

" 10.

" 12.

" 14.

May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

increasing the extent of their holding they would probably be able to command a majority at the Mining Board, which would be of much importance to them, while, on the contrary, if they did not get the plaintiffs to join them there was a strong probability of the plaintiffs joining the French Company, and thus increasing in a similar manner the influence at the Board of the most powerful rival of the Central Company. Moreover, besides the political reason, there was this practical reason, that the Central Company had some reason to apprehend that the whole of their working in their then block of claims might be stopped by falls of reef, in which case it would be of great advantage to them to have in hand the high ground of the Rose-Innes Company, which, it is true, was covered with reef, but which they could have worked in that event to very considerable profit. I do not think, taking all the circumstances into consideration, that the price which the Central Company agreed to pay for the high ground was unreasonably low; but it is clear, from the statements of Mr. English, that, on certain contingencies arising, they expected to derive a very substantial benefit from its acquisition. As to the plaintiffs, the reasons which pressed them to amalgamation were of an even more cogent nature. As a Company they were in a state of practical insolvency. Their operations had never been successful. They had been in existence for three years, and during that time had only paid one dividend of four per cent., and that was when they first started, and Mr. O'Leary does not seem quite sure that this one solitary dividend was not paid out of funds borrowed from the bank. In June 1883, when the letter was received from the Central Company, their position was about as bad as can be imagined. Their shares, nominally worth £25 fully paid up, were purchasable for £3. They had no cash or diamonds in hand, or blue ground on the floors. All their claims were covered with reef, and they had no means of removing it. They were mortgaged twice over to the bank, to whom the Company owed some £30,000. They had Mining Board bills under discount for which they would become liable on maturity. The only result which could be foreseen was, as Mr. O'Leary put it at the meeting of shareholders, "the intervention of Mr. Cornwall." The

only means by which that intervention had been hitherto staved off was the credit which the Company had gained on its becoming known that an amalgamation with the Central Company was projected. It was in these circumstances that on the 28th of June the chairman and directors of the Rose-Innes Company were placed when they received a letter from the secretary of the Central Company to the effect that his Company had learnt from Mr. English that the Rose-Innes Company desired to amalgamate, and that "the following terms have been arranged as a basis for negotiations." The terms, in substance, were as follows:—

(1.) Central scrip was to be issued for the extent of claim ground belonging to the Rose-Innes Company at a depth of 100 feet below the level of the hard rock—which was about the level which the Central Company had themselves reached at this time—at the rate of £8000 per claim, which was the rate at which the Central Company's own claims had been put in. The Rose-Innes was to be taken to have a *minimum* of $12\frac{1}{2}$ claims, and whatever claim ground it proved, on examination, they had greater than this *minimum* at that level, scrip was to be issued for such excess. As a matter of fact it turned out that the Rose-Innes had about $13\frac{3}{4}$ claims, and scrip was accordingly issued for that amount. This was exactly on the same basis as the capital stock of the Central Company had originally been formed (see clause 5 of trust-deed). Their scrip had been issued for claim-ground only, exclusive of machinery, &c.; and though the Company at the time of its formation owned nominally about $75\frac{1}{2}$ claims, scrip had been issued for only about 72 claims, allowing for $3\frac{1}{2}$ being cut out, as was anticipated, by reef. As a matter of fact it appears that at the 100 feet level about $5\frac{1}{4}$ claims are cut out, so the capital stock is about £14,000 more than it would have been had sufficient allowance been made for this reduction. The next point in the basis of negotiations set forth in Mr. Tucker's letter was that the Rose-Innes were to be paid by the amalgamated Company 5s. per load for all the ground "above the aforesaid level at which measurement shall be made." Machinery and rolling stock was to be given in, and the amalgamated Company was to take over all liabilities of the Rose-Innes, against which the

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 —
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

Mining Board bills held by the Rose-Innes were to be set off at par, and the balance of liabilities over these assets was to be deducted from the payment to be made on account of the high ground. A committee was to be appointed to inspect the books of the Rose-Innes in order to verify the returns and statements of yield, &c.; and on their report proving satisfactory, and after communicating with the English shareholders, the Central Directors would be prepared to recommend to the shareholders "the completion of the contemplated amalgamation." This letter having been received by the Rose-Innes directorate, they passed a resolution calling a meeting of shareholders "for the purpose of authorising the directors to do all that may be necessary to complete the acceptance of the offer of the Central Company." This was in accordance with the amended clause 77 of the Rose-Innes trust-deed, which provides that "a full board of directors may at any time, upon such terms as they shall think fit, provisionally entertain proposals to amalgamate the Company with any other company, &c., and the directors may make proposals for that purpose provisionally, and such proposals when definitely arranged shall be submitted to a special general meeting to be convened for that purpose, and such special general meeting shall have the power to take into consideration any such proposals, and to conclude any final agreement or arrangement for such amalgamation, purchase or acquisition, *and to authorise the directors to arrange the details thereof, &c.*" This amended clause was resolved on by the Rose-Innes shareholders at two meetings held on April 2nd, 1883, and July 4th, 1883, and although it contains some further provisions as to dissentient shareholders, &c., which it is unnecessary to set forth, as far as I have quoted it appears to have been copied from clause 83 of the Central trust-deed, with which it is *verbatim* identical. A meeting of Rose-Innes shareholders was consequently held on July 25th, at which, after considerable discussion, it was unanimously resolved "that this meeting accepts the offer of the Central Company in terms of their letter of June 28th, and authorises and empowers the directors to complete the amalgamation of the Company's claims, &c., and sale of high ground." This resolu-

tion was communicated to the Central Company, who held a special meeting on August 1st, when, on the motion of Mr. English, it was unanimously resolved, "that the action of the directors, relating to the amalgamation of the Rose-Innes Company with the Central Company, be approved of on the basis agreed to by the shareholders of the former Company, and that the directors be empowered to carry the same into effect (at) as early a date as convenient." These resolutions having thus been passed by the two Companies, their respective directorates were, by the terms of the trust-deed of each Company, authorised to carry out the amalgamation on the basis agreed on, and "to arrange the details thereof," without any further authorisation or ratification by the shareholders. The whole question which the Court has to determine is whether an arrangement by which the *pro rata* share of the Rose-Innes shareholders in certain assets of the Central Company, then in hand, was to be deducted from the payment for the Rose-Innes high ground, was a departure from the basis accepted by the shareholders of the two Companies, or whether it was such a detail as the directors were empowered to arrange. It has been contended on behalf of the plaintiffs that the documentary evidence—Tucker's letter of June 28th, and the Rose-Innes and Central resolutions of July 24th and August 1st respectively—was so conclusively and unambiguously in favour of the former view that the Court could not admit oral evidence as to what was really in the minds of the parties; but that was a contention which I felt unable to accept. I am prepared to admit that if I were called upon to construe Tucker's letter, which expressly purports to be only a "basis for negotiations," as embodying the agreement itself, the effect would be that the Rose-Innes shareholders would be entitled, as soon as the scrip in the amalgamated Company was issued to them, to share in all the undistributed assets which, at the time of the amalgamation, had belonged to the Central Company. But I think it by no means so clear that, merely through the undoubtedly ill-advised and careless omission to mention the matter in the letter which formed the basis for negotiations, it became impossible and *ultra vires* for the directors in the course of those negotia-

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

1884.

March 5.

" 7.

" 10.

" 12.

" 14.

May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

tions to raise the question as one of the matters on which some special arrangement ought to be made. I think the case is one in which a refusal by the Court to hear what was really in the minds of the parties might very probably lead to an inequitable decision. Now, from the evidence for the defence it is clear that the defendants, after the experience they had acquired of the way in which similar matters had been dealt with in previous amalgamations which they had effected, did not contemplate when that letter was written that it would preclude the directors from making some such arrangement as they now set up. Both Tracey and English most distinctly state that they never supposed, or construed the offer made by the Central as implying, that their assets in hand would go into the amalgamated Company, at all events without some special arrangement as to the *pro rata* share which the Rose-Innes shareholders would thus acquire. Mr. Tracey says, as to the retention by the Central shareholders of these assets, that "it went without saying," which it certainly did not; and it is just this sort of assumption, in negotiations between men of business, that things "go without saying," which has the unfortunate result of ultimately landing them in Courts of law. Then what was the view taken by the Rose-Innes Company? It is said that the opinion on the subject entertained by Mr. O'Leary or anybody else does not bind the Company; but how are we to ascertain what was understood by the Company on a point like this, except by ascertaining the view of its members? As to those assets which the Central now claim to retain, it is clear to my mind that Mr. O'Leary never expected that the Rose-Innes shareholders would unconditionally participate in them. He says, "the principle and basis of the amalgamation, not the details, were arranged on the 25th of June. The details are not settled yet. The matter of respective liabilities, assets, &c., stock-in-trade, &c., of the two Companies were details to be settled later on." And again he says in cross-examination: "Long before the meeting of October I had expressed an opinion that our Company should not share in these assets." It is also clear from the evidence of Mr. Cowan, Mr. O'Leary's co-plaintiff and co-trustee, that personally he took the same view.

Further, it appears from an incidental observation of Mr. Olsen, an influential shareholder and director of the Rose-Innes Company, at one of the Company's meetings, that he, like Mr. Tracey, thought it went without saying that, as far as some of these assets at all events were concerned, the Rose-Innes would have no claim to participate in them. In the face of this view, entertained not only by all the representatives of the Central, but by the leading representatives of the Rose-Innes as well, I think it impossible to affirm that the "basis of negotiations" suggested by Mr. Tucker clearly and unambiguously decided this point in the opposite sense, and left no room for doubt on the subject. The assets in question consisted of two classes: First, there was the blue and lumps on the Central Company's floors of considerable value, and their hardware and other stock in hand; then there were certain diamonds, cash, and Mining Board bills. As to the diamonds, they appear to have been shipped to England some time previously; and, had it not been for the great depreciation in prices at the time, and the fact that the Central was in a sufficiently strong position to be able to hold them over till the market improved, they would in all probability have been sold and the proceeds distributed among the shareholders before the amalgamation negotiations were set on foot. Similarly as to the Mining Board bills, a large proportion of them were overdue. They had been given, partly for work done in the removal of reef and water, partly in satisfaction of certain judgment debts under judgments delivered by the High Court at the end of August or the beginning of September, 1882, and thus this asset also represented moneys which in the ordinary course would have months previously been available for distribution. The first thing that we hear of any negotiations between the Directors on this point is that on the 1st of August, before the meeting of the Central, Mr. English made an unsuccessful attempt to obtain from Mr. O'Leary a renunciation of any claim on the part of his Company to participate in the blue, lumps, and stock-in-trade of the Central. On Mr. O'Leary refusing, English observed that it might imperil the amalgamation, as the Central shareholders might raise a difficulty on the point. This argument

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 —
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

1884.
 March 5.
 „ 7.
 „ 10.
 „ 12.
 „ 14.
 May 8.

Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

did not produce any concession from Mr. O'Leary ; but, as a matter of fact, the question was not raised at the meeting held immediately afterwards. Negotiations continued, principally between O'Leary and English, up to August 23rd, when the latter left for Cape Town, and did not return till October 6th. Before leaving, it seems that English had produced the impression on the minds of the Rose-Innes representatives that his Company would waive their claim to the blue, hardware, &c., although English himself says that he never intended to do so. The next date of importance is September 24th, when a meeting of the Rose-Innes shareholders was held, at which another letter was read from Mr. Tucker, the secretary of the Central. This letter, after referring to the measurement of the Rose-Innes claims and high ground, the latter having been measured at 1,150,000 cubic feet, which measurement being taken in the solid is admitted to have been equivalent to 115,000 loads, concludes with the observation, "The assets due to the shareholders of this Company you will see by reference to memo. attached." The memorandum includes all the assets above referred to and shews a balance, after deducting the Company's liability at the bank, of £92,000, which Mr. Tucker describes as "due to shareholders of this Company." A meeting of Rose-Innes shareholders was held the same day, at which this letter and memorandum were read, and the claim made by the Central Company in respect of their assets was thus clearly before the meeting. It is very important to observe how it was dealt with. After reading Tucker's letter and memorandum a resolution was proposed by Mr. Fenton and seconded by Mr. Hurley: "That the resolution of July 25th, accepting the offer of the Central Company to amalgamate certain property of the Rose-Innes Company with the Central Company, and for the purchase by the Central Company after such amalgamation of certain other property of the Rose-Innes Company, be strictly adhered to." An amendment was then proposed by Mr. McFarland and seconded by Mr. Girling, "That the letter and memo. of the Central Company of this day's date be referred to the directors, to be dealt with in terms of the resolution of July 25th." Mr. McFarland's amendment was put and

carried as a substantive resolution, Messrs. Fenton and Hurley alone dissenting, and the next day it was communicated by Mr. O'Leary, as secretary, in a letter to Mr. Tucker. In this letter Mr. O'Leary, after giving the terms of the resolution, added: "I am instructed to inform you that the directors of this Company are prepared to go into the matter of the memorandum as soon as may be convenient to your directors." It certainly appears to me that at this meeting of the Rose-Innes Company (which I think in the absence of any evidence to the contrary we ought to presume was properly convened for the consideration of the matter) there were two distinct proposals before the shareholders—one that of Fenton, practically repudiating the claim embodied in the Central memorandum of assets, on the ground that it was not strictly within the terms of the former resolution; the other that of McFarland, leaving the matter to be dealt with by the directors in terms of that resolution, i.e. as being one of the matters which, when the directors were empowered to complete the amalgamation of the Company's claims, &c., they were impliedly empowered to arrange; in fact, as being one of those details the arrangement of which by the directors was contemplated by the trust-deed. This view was communicated to the Central Company, and a formal protest was entered by Messrs. Fenton and Hurley. In accordance with the resolution of the Rose-Innes Company and Mr. O'Leary's letter, the directors of both Companies resumed negotiations on this point, and the claim of the Central to the blue lumps, and stores was abandoned, mainly as it would seem on O'Leary's representation, which appears to have been a mistaken one, that this had already been waived by English. This was at the beginning of October. Mr. Tracey says: "I remember Beningfield and I met Cowan and O'Leary shortly before English returned, when the question of assets came up. We were talking of the question of how the Rose-Innes were to be paid for their high ground. O'Leary suggested debentures should be given. Beningfield said we should also have to issue debentures for our own assets to our shareholders, and asked O'Leary which course would be preferable. After further conversation it was

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 ———
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs
 Central Dia-
 mond Mining
 Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

agreed to set off assets against assets, and that the balance only should be paid for. These suggestions were tentative; it was not a formal meeting. It was about October 1st. The conversation was referred to and resumed at a meeting on October 8th. The memorandum of assets was before us on October 1st. It was not till October 8th that we waived our claim for stock, stores, blue, and lumps." Meanwhile, on October 2nd, Mr. O'Leary caused a case to be submitted for counsel's opinion, asking whether, according to the proper construction of the agreement between the parties, the Rose-Innes shareholders would be entitled to share *pro ratâ* in the blue ground, lumps, and stores of the Central (these were the only assets out of those set forth in Tucker's memorandum which were mentioned in the case), and adding that "all the shareholders, barring Mr. Fenton, are desirous to amalgamate even should they not be entitled to get the benefit of the stock, &c., of the Central Company." Before counsel's opinion had been obtained, on October 6th, Mr. English returned to Kimberley. A committee of Central Company directors, consisting of Messrs. Bottomley, Tracey, English, and Beningfield, was then appointed for "the final settlement of the details connected with the amalgamation," and a similar committee, consisting of Messrs. O'Leary and Cowan, was appointed by the Rose-Innes Board for the same purpose. On October 8th, Mr. Tucker sent Mr. O'Leary a scrip certificate for the shares which, in accordance with the arrangement, the Rose-Innes Company were to acquire in the Central Company in consideration of the transfer of the claims. On the same day the meeting for the final settlement between the persons above mentioned took place, Messrs. Cowan and O'Leary assuring the Central directors that they were duly authorised and empowered to represent their Board. Previous to this meeting Messrs. O'Leary and Cowan had waited on the *Crown Prosecutor*, who had not yet written his opinion on the case submitted to him, but who then verbally intimated to them his view that the Rose-Innes shareholders were entitled to share *pro ratâ* in the assets referred to in the case. At the meeting the questions were discussed of the exact number of loads of high ground for which the Rose-Innes were entitled to payment, and of the

assets in hand of the Central Company, and there can be no doubt from the evidence that an arrangement was then effected substantially the same as that now alleged by the defendants. The number of loads was fixed at 110,000, the Central gave up all claim to reserve their blue, lumps, and stores, and the Rose-Innes directors on the other hand agreed that their Company's *pro ratâ* share as members of the amalgamated Company in the Mining Board bills, cash and diamonds the Central had in hand should be deducted from the balance which (after deducting the excess of their liabilities over their assets) remained due to the Rose-Innes for the loads of high ground. Something seems to have been said by Mr. O'Leary about the reference of this matter to his Board being "a mere matter of form," and Mr. Cowan says he expressed considerable doubt as to whether the Rose-Innes shareholders would agree to it. However the Central directors appear to have been satisfied with the consent of O'Leary and Cowan, and the scrip in bulk was delivered by Bottomley to Cowan as representing the Rose-Innes shareholders. The Rose-Innes licences were subsequently endorsed and the claims transferred to the Central Company. Meanwhile, on October 9th, the Rose-Innes directors held a Board meeting at which Messrs. O'Leary and Cowan reported the agreement effected with the Central on the previous day, and the Board decided to accept the terms as above set forth "always provided the same is in accordance with the opinion of Mr. *Hoskyns*." The opinion of Mr. *Hoskyns* was received the following day, and although, as already mentioned, the case submitted referred exclusively to the assets, the Central claim to which was afterwards waived, the opinion contained expressions sufficiently broad to cover the other assets, the Central claim in respect to which had been allowed. In consequence of this opinion, the Rose-Innes directors have not considered the arrangement of October 8th as binding on them, and have abstained from recommending their shareholders to accept it. It was not however till some time afterwards that they communicated this change of view to the Central Company, and in the meanwhile a considerable quantity of Central scrip had been issued at their request to the individual shareholders of

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

the Rose-Innes, in proportion to their respective holdings, and in some cases subsequent transfers of this scrip were effected. On December 14th, Mr. O'Leary wrote to the Central Company to the effect that in consequence of the opinion of Mr. *Hoskyns* the payment for the *pro ratâ* share of the Central assets, which figured in the statement of accounts between the two Companies, was an item which could not be allowed. A promissory note, tendered by the Central for the balance, after deducting this payment, was refused; and at a meeting of the Rose-Innes held on December 14th, the directors were instructed to demand and recover from the Central Company immediate payment of the full amount now sued for. The meeting concluded with a suggestion from Mr. McFarland that the case should be taken "to the Supreme Court instead of the High Court here, for if the result went against the Central here, the Central would not be satisfied without taking it to the Supreme Court." How the Central were to go from the High Court to the Supreme Court, Mr. McFarland omitted to explain; and perhaps that is the reason why his suggestion, unfortunately for the High Court, was not adopted. I have found it necessary to set out what I understand to be the main facts of this case at considerable length; but the conclusion which I derive from them can be expressed in very few words. Bearing in mind the terms of the trusts-deeds, and of the resolutions of the shareholders' meetings of the two Companies, was the arrangement made by their representatives on October 8th *intra vires* or *ultra vires*? In the former case it is clear there must be judgment for the defendants; in the latter the legal effect of the facts is perhaps not quite so clear. For myself, bearing in mind the various negotiations which took place between the parties, and particularly the resolution passed by the Rose-Innes Company in September, and communicated to the Central, I have felt a strong tendency to regard this arrangement as *intra vires*, and therefore valid and binding; but as the powers of the Directors to make such an arrangement were by no means clearly given, as the point was at least a doubtful one, and certainly the arrangement actually effected was not a natural consequence of the basis which had been accepted:

as it seems on the whole to have been something more than what can fairly be regarded as a point of "detail;" as, above all, the power to effect such an arrangement was, by the trust-deed and the resolution of shareholders, a power given to the Board of Directors and not to any two of them; and as the arrangement effected by O'Leary and Cowan was approved by the Board, only on condition of its being in accordance with the opinion of Mr. *Hoskyns*, which we know it was not; recognising as I do the cogency of all these arguments, and the obstacle which they present towards regarding this agreement as binding on the parties, and thus giving effect to the defendants' plea: on these grounds I am not prepared to dissent from the view entertained by both my colleagues that the agreement of October 8th was *ultra vires*, and the plea to the action, so far as it relies on that agreement, must be held to have failed. Then, it may be said, the plea having failed, the contract as set forth in the declaration must be held to have been admitted, and there is much force in this contention. But I do not think in a peculiar case like this we should tie the parties down too narrowly to the letter of their pleadings, especially if it appears that the adoption of such a course would prevent substantial justice being done. If a plaintiff says in substance, "I made a contract with the defendant which is represented by the term x ," and the defendant replies "No, our contract is represented by the expression x plus y ," and the defendant fails to prove that such was the case, I think that the plaintiff must still prove to our satisfaction that there was a contract, and that its effect is represented by x , before he can recover on that allegation. Now, taking the agreement of October 8th to be *ultra vires*, what is the position? The defendants have failed to shew that x plus y is the proper algebraical symbol to represent the facts; but then they urge "that is what we fully understood it to be, and if we were mistaken, then x does not represent the contract, because the only contract we have ever recognised was x plus y , and if that does not exist there has been no contract, no *consensus ad idem* at all." Have the plaintiffs proved that independently of the agreement of October 8th there was any *consensus*? The directors on both sides were to meet and arrange the

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.
 ———
 Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited.

1884.
 March 5.
 " 7.
 " 10.
 " 12.
 " 14.
 May 8.

Rose-Innes
 Diamond
 Mining Co.,
 Limited, vs.
 Central Dia-
 mond Mining
 Co., Limited

details necessary to complete the transaction, but except on October 8th they never met for such a purpose, and therefore the transaction has never been completed. One of the "details," as I should have supposed, would in all probability be an arrangement as to the terms of payment for the high ground, ground which would not be won or realised, as it appears, for from twelve to eighteen months. Terms were accordingly arranged for payment by a promissory note at eighteen months; because the only arrangement made, on a point obviously requiring arrangement, was *ultra vires*, are we to hold the plaintiffs to be justified in their peremptory demand for payment in cash? On the whole I am of opinion that, putting aside the agreement of October 8th, there was no completed contract, no thorough *consensus* between the parties such as is essential to a contract, but merely an inchoate arrangement of which the plaintiffs are not at present entitled to demand the performance. I certainly think it would be most inequitable to tie the parties to an arrangement which we know that the defendants never intended to make, and which was certainly not understood, in the sense now set up, by the leading representatives of the plaintiff Company themselves. Thus, the plaintiffs having failed to shew that they are entitled to recover on the alleged contract, and the defendants not having proved to the satisfaction of the Court the existence of a binding agreement of the nature set up by them, the only possible judgment seems to be one of absolution from the instance. As a rule, when a plaintiff fails to prove his case he is ordered to pay the costs of the action; but as, to put the matter concisely, the present case is one in which the parties by their manner of doing business appear to be almost equally responsible for the imbroglio which has resulted—the responsibility of the defendants for that imbroglio beginning with the terms in which their original proposal was contained in Tucker's letter of June, and being certainly not less than that of the plaintiffs—I am not disposed to differ from the view of my colleagues that there should be no order as to costs. It is possible that this decision may not commend itself to either litigant; possibly it may result in their arriving at some settlement between themselves of the matter in dispute, as

strongly suggested by my brother JONES and myself while the case was in progress. If, however, such an understanding cannot be brought about, it is at all events satisfactory to know that it is open to the parties to obtain, at a very early date, the judgment on the matter—not, as Mr. McFarland vainly imagines, of the Supreme Court—but of the highest tribunal in the Colony, the Court of Appeal.

[Plaintiffs' Attorney, RHODES.
Defendants' Attorneys, STOW & CALDECOTT.]

1884.
March 5.
" 7.
" 10.
" 12.
" 14.
May 8.

Rose-Innes
Diamond
Mining Co.,
Limited, vs.
Central Dia-
mond Mining
Co., Limited.

IN RE ESTATE OF REINACH.

Ord. 6, 1843, § 44.

Where the trustee of an insolvent estate, in consequence of exceptional circumstances in the administration, had been allowed commission at the rate of 5 per cent. on the sale of immovables in the liquidation account, and at the rate of 2½ per cent. on disbursements appearing in the contribution account:—Held, that it was not competent for the Master to allow him special remuneration, by way of bonus, in addition.

This was an application for the confirmation of the second liquidation and contribution account in the insolvent estate of Herman Reinach. The matter had been before the Court on several previous occasions: see *In re Estate of Reinach*, High Court Reports, vol. ii., part 1, p. 134. In accordance with the order on that application, the acting Master had made a report in which he stated that certain further vouchers had been supplied, and recommended that in the special circumstances of the case the trustee should be allowed commission at the rate of 5 per cent., as sanctioned by the previous Master, on the immovable property, together with some reasonable commission on the disbursements, and that he should also be allowed a special commission of £105 owing to the exceptional difficulties he had encountered in the administration of the estate. This report was submitted

1884.
March 6.
" 31.
In re Estate
of Reinach.

1884.
March 6.
„ 31.

*In re Estate
of Reinach.*

to the Court on January 25 (*coram* LAURENCE, J.), when the following directions were given :—

1. That all items and expenses for which the Master considers the vouchers to be now sufficient should be allowed and included in the account, and no others.

2. That, having in view the reports and recommendations of the former and the present Master, the trustee should be allowed to charge commission at the rate of 5 per cent. on sale of immovables and other items in liquidation account upon which commission is chargeable and has not been charged in former account.

3. That the trustee be allowed commission at the rate of $2\frac{1}{2}$ per cent. on disbursements to date appearing in the contribution account.

4. That the special extra remuneration of £105 recommended by the Master be not allowed.

5. A second account to be framed on this basis, and confirmation to be applied for in the ordinary course.

A second account had accordingly been framed, in accordance with these directions, except that the item of £105, as to which the trustee desired to obtain the opinion of the full Court, had been included.

Forster (with him *Davison*), for Mackie Dunn & Co., creditors in the estate, objected to the special remuneration of £105, and also objected that commission had been charged on more than the actual disbursements. As to the special remuneration, the point was really decided by the case of *Standard Bank vs. Biden's Trustee* (*supra*, p. 222).

Hoskyns, C.P., for the trustee, referred to sect. 44 of Ord. 6 of 1843, and contended that there was nothing illegal in the trustee being remunerated otherwise than by commission. The Master had fully investigated the matter, and decided, in the exercise of his discretion, to allow this item. As to *In re Denison*, Buch. 1868, 5, there were not sufficient circumstances in that case, as there were here, to justify the Court in departing from the ordinary rule. The administration of this estate had involved protracted litigation, and been attended by the greatest difficulty, and was therefore in an exceptional position.

Forster, in reply :—As was said in *Standard Bank vs. Biden's Trustee*, when trustees enter on an office, which is often very lucrative, they do so at all risks. It is not competent for the Master to assess remuneration both ways, both by commission

and bonus. There is no precedent for such an exercise of his discretion, and it is submitted that it is entirely illegal. By referring to the Master's report it will be seen that the Master awarded this special sum mainly on account of the arrest and subsequent detention of the trustee in the Free State; but the Court has already decided that on account of this he cannot claim more than his actual expenses, which were allowed him on the first account.

1884
March 6.
" 31.

*In re Estate
of Reinach.*

Cur. adv. vult.

Postea (March 31),—

The COURT held that, as the trustee had been allowed commission at the exceptional rate of 5 per cent. on the immovables, the extra remuneration of £105 could not be allowed, and directed this item to be struck out, and the balance carried forward to the next account to be increased by that amount. With this alteration, the account was ordered to be confirmed, and the costs to be costs in the estate.

[Attorneys for Trustee, CORYNDON & CALDECOTT.]
[Attorney for Creditors, RHODES.]

SOLOMON *vs.* CUMMING.

Letting and hiring.—Pledge of movables.—Deed of sale.—Use and occupation.—Construction of written documents.

S. bought a piano, the property of R. C., at an execution sale, took possession, and subsequently let it for three months to A. C., the brother of the former owner, a printed form of lease being used in which the amount of the rent was not filled in. The lease gave A. C. a right of pre-emption, on payment to S. of the purchase price at any time during the continuance of the lease, which further stipulated that, if either party were desirous of terminating the agreement at the end of the three months, he should give one month's notice of his intention. The piano remained in the posses-

sion either of A. C. or R. C. (which of them was actually in possession was disputed) for several months, after which S. brought an action against A. C. for "rent, use and occupation" at the rate of 30s. a month, and gave evidence that he had obtained a rent of 20s. a month for an inferior instrument. The defendant denied that the piano had ever been in his possession, and alleged that the lease was merely intended to operate as a security for the repayment of the purchase money, which had really been lent by S. to R. C.

Held, on appeal, reversing the decision of the magistrate, (JONES, J., *dissentiente*), *that the documents executed by the parties to the action must, as between the parties, speak for themselves, and that A. C. could not deny the ownership of S., or his own use and occupation, and must be ordered to pay for the latter at the rate of £1 per month.*

1884.
March 6.
—
Solomon vs.
Cumming.

This was an appeal from a decision of the Resident Magistrate of Du Toit's Pan. The appellant, Solomon, had originally brought an action in the Court below for £15, being as rent due upon the lease of a piano to the defendant A. W. Cumming. The defendant raised an exception that the lease, a written document, did not fix the rent; and the Magistrate dismissed the case, holding that the contract was invalid on that ground. The plaintiff then brought an action for the same amount, being for the use and occupation of the piano by the defendant from 10th March, 1883, to 10th January, 1884. The evidence was very contradictory. It appeared that in February, 1883, a piano, the property of R. D. Cumming, the defendant's brother, was taken in execution of a judgment against him and sold at an execution sale. The plaintiff swore that he had bought it and paid the messenger, and that he then handed the piano to Cumming. The piano at the time of the sale was in the possession of R. D. Cumming, and was left there. R. D. Cumming wished to hire it, and plaintiff obtained possession of it and kept it for a short time. He then, at their request, handed it to the Cummings, and a document was entered into by him and A. W. Cumming whereby A. W. Cumming, in consideration of £35 paid him by Solomon, ceded, transferred, &c., the piano to the said Solomon, and declared that

he had delivered possession thereof to the said Solomon. This document was dated the 8th March, 1883, and was signed by A. W. Cumming and S. Solomon, and witnessed by R. D. Cumming. Another document, dated the 10th March, 1883, being a memorandum of agreement of lease, similarly signed and witnessed, was produced in evidence, whereby Solomon let the piano to A. W. Cumming for the term of three months, at the end of which time the said A. W. Cumming agreed to deliver up the piano to Solomon. A further clause stipulated that, should either of the parties be desirous of terminating the agreement at the end of the three months, he was to give a month's notice of his intention. Finally it was agreed that A. W. Cumming, if he was desirous of so doing, could, at any time before the expiration of the said term of three months, purchase the piano, and should have a right of pre-emption thereof, for the sum of £35, together with any rent that might be then owing by virtue of the agreement. These documents were both on printed forms filled in, and in the latter the printed clause stipulating for the amount of rent reserved had been left as printed, no amount, however, being filled in for rent. This the plaintiff said was in consequence of an understanding that fixing the amount of the rent should be left to him. The piano was delivered at R. D. Cumming's house, where the plaintiff swore that the defendant had been at that time living. The plaintiff admitted that in October, 1883, he had had some unpleasantness with A. W. Cumming, and that he had then told R. D. Cumming that he might use the piano, but that the defendant was not to have it. The version given by the Cummings was that the defendant bought the piano at the execution sale in reality for his brother; but finding that he had not sufficient money to pay the price, he was about to give up the idea of buying it back, when R. D. Cumming met the plaintiff and told him of the state of things; whereupon the plaintiff, who was then on very good terms with them both, immediately advanced the requisite sum of £35, and A. W. Cumming bought and paid for the piano, which was left with its former owner. It was subsequently delivered to the plaintiff, and the documents entered into to secure him; and as to the

1884.
March 6.
—
Solomon vs.
Cumming.

1884.
March 6.
—
Solomon vs.
Cumming.

rent, the plaintiff had said he did not want anything from R. D. Cumming. The defendant had never had the use or possession of the piano, which had always been at R. D. Cumming's house. The defendant did not live with his brother, but had a house of his own. R. D. Cumming further deposed that in October, after some unpleasantness with his brother, the plaintiff had come to him and said, "You can have the piano as long as you wish, but Willie (the defendant) can't." R. D. Cumming replied, "The piano was never in Willie's possession, but in mine, as you know." Plaintiff replied, "Very well, that's what I want." After this plaintiff agreed with R. D. Cumming that he could have the piano by paying £45; R. D. Cumming moved to another house, and moved the piano there too. He subsequently had some unpleasantness with plaintiff, and then the action for the rent was instituted. He had always had possession and the use of the instrument; when the first action was brought against A. W. Cumming, R. D. Cumming tendered £10 for the rent without prejudice.

The Magistrate found that the documents of the 8th and 10th March were not what they purported to be, but were drawn up to secure the use of the piano to R. D. Cumming, and to secure the plaintiff's loan of £35 at a time when plaintiff and R. D. Cumming were on friendly terms. He found that there had never been in reality a lease, and that A. W. Cumming had never had possession of the piano, but had allowed his name to be used in furtherance of the design to secure his brother in the use of, and the plaintiff for the advance on, the piano. He dismissed the case, and ordered each party to pay his own costs.

From this judgment the plaintiff appealed.

Levey, for the appellant, pointed out that there was no plea of fraud, and that therefore the respondent could not deny the lease. As to there being no rent reserved by the lease, it was quite competent for the parties to leave the matter open for subsequent settlement; *Van der Linden*, 238. [BUCHANAN, J.P., referred on this point to *Voet*, xix. 2, 7.] The contract of the appellant was with A. W. Cumming, and

he could not sue R. D. Cumming. The Magistrate having dismissed the original action for the rent, the plaintiff had instituted the action now under appeal, his claim being virtually for use and occupation. If A. W. Cumming chose to let his brother have the use of the piano he was still responsible to the plaintiff. He acknowledged the plaintiff's ownership, and between him and the plaintiff the title to the piano cannot be disputed. With regard to the rent, it was clearly contemplated that some rent should be paid. It was in evidence that R. D. Cumming, who drew the documents, frequently made inquiries as to the rent or interest to be paid, and at one time he made a tender which appellant says was not without prejudice. He must be taken in this matter to have been acting as agent for his brother, who allowed him to have the benefit of the piano, being himself responsible on the contract to the appellant. The sum demanded, being thirty shillings a month, was fair and reasonable rent, as the appellant had said in his evidence, and he had not been cross-examined on the point. The lease clearly contemplated the payment of some rent. The respondent had acknowledged the appellant's *dominium*; and as between the immediate parties the title of the owner, and the legal effect of the documents, could not be disputed.

1884.
March 6.
—
Solomon vs.
Cumming.

Lange, for the respondents, referred to the summons which claimed for the "rent, use, or hire of the pianoforte at the rate of £1 10s. per month, payable monthly in advance." It was clear, therefore, that the action was not merely for use or occupation at a rate to be subsequently fixed, but referred to the contract of hire where the same words occurred, though no amount was specified to be paid. No rent was demanded until ten months after the alleged lease, and it was clear that the appellant did not mean to charge any, until he quarrelled with R. D. Cumming. In these circumstances, the Magistrate's finding that there was not a lease at all, but that the documents were drawn up merely to secure the appellant, was quite correct. Moreover, the claim now was said to be for the use and occupation; but it had been clearly proved and virtually admitted by the appellant that respondent never had the use or occupation

1884.
March 6.
—
Solomon vs.
Cumming.

of the instrument. Furthermore, the rent must be agreed upon between the parties, or else it must be fixed by "usual custom." In this case there had been no custom proved. All that the Court had before it was that appellant thought 30s. a month not excessive, and that he got £1 a month for another piano alleged to be not so good as this one. There was ample evidence to support the Magistrate's view of the intention of the parties, in which case his judgment was correct.

JONES, J.:—I am of opinion that this appeal should be dismissed. It appears that on the 8th March, the appellant having previously advanced £35 to the respondent to make up the amount required to buy in the piano of his brother, R. D. Cumming, at an execution sale, a bill of sale was drawn out by which the respondent declared to have sold the instrument to the appellant for that sum. The appellant either then took or had previously had possession of the instrument for a short time, and on the 10th of March he let it for three months to the respondent, no rent being fixed in the document of lease. The document, however, stipulates that the respondent should at the end of the term deliver the chattel to the appellant, and further that either party wishing the agreement to terminate then should give a month's notice. A further clause gives the respondent the right of redemption and pre-emption on payment of the sum of £35, and such rent as then might be due, at any time during the term of three months. These agreements are really like the one in *Rens vs. Bam's Trustee* (2 Menz. 89), which was an attempt to effect a pledge under cover of a deed of sale, and so to protect a creditor against the other creditors. If that be the case, what does the present claim amount to? It is one for rent for the use and occupation of the article by A. W. Cumming. It is admitted that the piano has been in the use of R. D. Cumming, and has remained in his house. A. W. Cumming has another house of his own; and the appellant himself made R. D. Cumming promise that A. W. Cumming should not have the use of the piano after the quarrel in October. I am of opinion that the appellant cannot recover anything from

A. W. Cumming for the use and occupation which he knew that R. D. Cumming enjoyed.

1884.
March 6.
—
Solomon vs.
Cumming.

BUCHANAN, J.P.:—Though this action was not brought upon the documents which passed between the parties, they were produced in evidence to shew their position. According to the documents the transactions were between the appellant and the respondent, and the latter must be taken to have had the use and occupation of the instrument. There has been evidently so much shuffling between the brothers Cumming, and their evidence was so unsatisfactory, that it is advisable not to go behind the written documents. According to those documents it is clear that the appellant is the owner of this piano, and that it was hired by the respondent, who is therefore bound to pay a reasonable sum for the use and occupation. The evidence as to what would be a reasonable sum is very slight, but so far as it goes it is uncontradicted; and I think therefore that the appeal must be allowed, and judgment entered for the plaintiff for the sum of £10, being at the rate of £1 a month, with costs.

LAURENCE, J.:—The oral evidence in the Court below was very unsatisfactory, and I think this Court must be guided in its decision by the documents produced. I have no doubt that the original intention of the parties was that A. W. Cumming should become the lessee of the piano, with an equity of redemption, for a term of three months, which term had elapsed long before action was taken by the appellant. At the expiration of the three months the parties to the documents could not as between themselves dispute that the appellant acquired an indefeasible right to the ownership of the piano. There has been no variation since then of the position of the parties under the lease, no notice of intention to terminate the agreement has been given, and A. W. Cumming must therefore be taken to have had the use and occupation ever since March 10th, 1883. It is, moreover, clear from R. D. Cumming's evidence that at all events up to a certain period the piano was in his brother's possession, and that it was so understood by Solomon. On the whole, I concur in the view expressed by the JUDGE PRESIDENT.

1884.
March 6.
—
Solomon vs.
Cumming.

The Court therefore allowed the appeal; and, taking £1 a month as reasonable rent for the piano, ordered that judgment should be entered for the appellant for £10, with costs of appeal and costs in the Court below.

[Appellant's Attorney, NICHOLLS.]
[Respondent's Attorney, BEEVOR.]

THACKER vs DOYLE.

Act 4, 1883, §§ 2, 26, 32, 33, 36.—Proclamation 186, 1883.—
Board of Health.—Quarantine.—*Ultra vires*.

By the Public Health Act, 1883, the Governor is empowered to make, and to delegate to local authorities the power of making, regulations inter alia for the detention and isolation of persons likely to be infected with small-pox or other infectious disease, and for the prevention of the spread of disease. By Proclamation 186 of 1883, the Governor delegated to a local authority at Kimberley the power to make regulations for the detention and isolation of persons coming from the Transvaal, where small-pox had broken out, and for preventing the spread of disease. The local authority afterwards passed a bye-law for the detention and isolation of certain persons not coming from the Transvaal, but inmates of a general hospital at Kimberley where an infectious disease alleged to be small-pox had broken out, and who were therefore likely to be infected with such disease. Held (LAURENCE, J., dissentiente), that this bye-law was not ultra vires, but was a competent regulation under the general power of taking measures for preventing the spread of disease, and that therefore inmates of the hospital could be legally detained by an officer appointed by the local authority to carry out such bye-law.

1884.
March 7.
—
Thacker vs
Doyle.

This was an application involving the powers of a local Board of Health constituted under the Public Health Act, 1883. The respondent, in his capacity as Chief Sanitary Inspector and representative of the Board of Health, was called upon to shew cause why the applicant should not be allowed to leave the Carnarvon Hospital without let or hindrance, on the ground that his detention there was illegal. From the

applicant's affidavit it appeared that on February 9th, 1884, he was admitted into the hospital as a patient for injuries to his right hand ; on March 1st he was discharged and certified to be cured by his medical attendant. He thereupon applied to an officer in charge of the hospital, acting under instructions from the respondent, for permission to leave the hospital, but was refused. He then wrote a letter to the respondent, threatening legal measures if his illegal detention was continued, but to this letter he had received no reply, and he was still detained against his will.

Mr. Doyle made an affidavit, in which he stated that by Proclamation 186, 1883, published in the "Government Gazette" of November 2nd, the Board of Health was empowered to give directions for preventing the spread of small-pox, and by a certain bye-law, passed by the said Board on December 12th, 1883, it was made lawful for him in his capacity of Chief Sanitary Inspector, on the certificate of any qualified medical practitioner that there was within any house or premises any person suffering from or likely to be infected with small-pox, to order forthwith the isolation of such premises, such order to be in writing and to be affixed to the door or other conspicuous part of such premises, and thereafter no person except medical practitioners, or persons authorised by the deponent or any medical officer of the Board of Health, should be permitted to enter such house or premises, and every person before leaving such premises should be liable to be fumigated and disinfected, the bye-law further providing that he should report every such order to the Board of Health at its next meeting for confirmation or otherwise. Thereafter, on February 27th, 1884, Dr. Sauer, medical officer to the Board, gave the deponent a certificate setting forth that one or more persons had been found in the Kimberley and Carnarvon hospitals suffering from small-pox, and thereupon he caused the said hospitals to be isolated, and surrounded the same by a cordon of police, with instructions not to admit any person on the premises unless duly armed with the proper certificate, and not to allow any person to leave the premises under any circumstances except such as would be entitled to leave by virtue of their certificates, and he attached a notice in writing to the gate of the

1884.
March 7.
—
Thacker vs.
Doyle.

1884 ~
 March 7.
 Thacker vs.
 Doyle.

hospital, to the effect that the place was under quarantine and no person would be allowed ingress or egress except upon a certificate granted by himself or by a medical officer of the Board. He had duly reported such order to the Board of Health, at its meeting on February 28th, when the same was confirmed. Dr. Sauer, medical officer to the Board of Health, made an affidavit to the effect that two fatal cases of small-pox had occurred in the hospital, and he therefore deemed it necessary that the hospital should be quarantined and its inmates detained as being likely to be infected with small-pox, and in order to prevent the spread of that disease. He had accordingly given Mr. Doyle the certificate mentioned in his affidavit, and he considered it would be unsafe and dangerous to the health of the town to permit persons who were in the hospital at the time small-pox existed there to leave the said hospital until a few days longer had elapsed. Dr. Duirs, resident-surgeon at the hospital, who had resumed his appointment since the occurrence of the cases in question, made an affidavit in which he expressed the opinion that the disease regarded by Dr. Sauer as small-pox was "of a highly dangerous and infectious nature." He added, "Should the cases reported to me by Dr. Sauer as small-pox cases have in reality suffered from that disease, then I am of opinion that, although hitherto no premonitory symptoms of small-pox have declared themselves amongst any of the inmates of the hospital, yet that sufficient time has not elapsed to determine with certainty that none of the said inmates have caught the infection, and several days must still elapse before any certainty can be felt on the subject."

Forster, for the applicant, said the only question was whether the respondent and the Board of Health had acted within their powers in putting the Kimberley hospital into quarantine, and detaining the inmates. The vexed question whether the disease from which the patients referred to suffered was small-pox or "a bulbous skin disease allied to pemphigus" was not before the Court. If the Board of Health had acted *ultra vires*, the Court would order the barrier to the applicant's liberty to be removed, irrespective of the question

of the public good. The Act which conferred its powers on the Board was the Public Health Act, No. 4 of 1883. The Act was divided into several parts; Part 1 contained "General Provisions," Part 2 dealt with "Quarantine," that is to say quarantine in its proper acceptation, for ships, ports, and harbours; but he contended that there was nothing in the Act authorising "inland quarantine." Part 3 related to "Infectious Diseases and Hospitals," and by sect. 32 the Governor was empowered "to make regulations or give directions for all or any of the following purposes, which regulations and directions should be acted upon by the local authority immediately any portion of the colony is affected by or threatened with small-pox, or any epidemic, endemic, infectious or contagious disease." The purposes specified were: (1) house to house visitation; (2) speedy interment; (3) conducting funerals; (4) medical aid and accommodation; (5) the detention and isolation of persons suffering from or under circumstances likely to be infected with such disease, and for preventing the spread of disease; (6) cleansing, ventilation, and disinfection; (7) prevention of overcrowding, &c. Section 33 required the local authority to take all necessary steps for the execution of such regulations and directions as aforesaid. Proclamation 186, of 1883, referred to by Mr. Doyle, was in the following terms:—

"Whereas small-pox has broken out in the Transvaal, and the territory of Griqualand West is threatened with the disease from that State. Now therefore I do hereby proclaim, &c., that all persons coming from the Transvaal, and all persons travelling along any road leading from the Transvaal into Griqualand West, are likely to be infected with such disease; and I do further proclaim, &c., that the Board of five persons nominated by Government Notice No. 1098, dated this 1st day of November, 1883, is empowered to give directions for the detention and isolation of all such persons, and for preventing the spread of the disease, and is further vested with power to give directions for the following purposes:—"

Then followed all the purposes enumerated above in the various clauses of sect. 32, *with the exception* of those mentioned in clause 5, for the detention and isolation of persons likely to be infected, &c. These powers were conferred by the Governor on the local Board under sect. 26, clause 8, which empowers the Governor to "order or direct that all or any of the powers, duties, or acts, authorised or required to

1884.
March 7.
Thacker vs.
Doyle

1884.
March 7.
Thacker vs.
Doyle.

be performed by the Governor at any port or place in this Colony, may be exercised, performed, or done by any local authority appointed by the Governor, subject to such restrictions as he may impose." This provision, however, was in part 2 of the Act, relating to quarantine, and it might well be contended that it only empowered the Governor to delegate these powers "at any port or place" to which quarantine regulations were properly applicable, and that this did not include inland places. However that might be, it was clear that the Governor had expressly refrained from delegating to the local Board the power to detain and isolate under clause 5 of sect. 32, except in the case of persons coming from the Transvaal. The bye-law under which the Board had assumed the power to isolate the inmates of the hospital was therefore *ultra vires*, and the action of the respondent without legal protection. Section 36 of the Act shewed the limits of the powers of the local authority, irrespective of those conferred on them under sect. 32, and did not authorise anything like the proceedings now complained of. The detention and isolation of persons involved an interference with the liberty of the subject, and could not be covered by the general power to take measures "for preventing the spread of the disease;" the power to detain required to be specially conferred, and if it was essential for the Board to have this power they could telegraph to Cape Town and get a fresh proclamation.

Hoskyns, C.P., for the respondent, said it was clear that the word "quarantine" was used in this Act in an extended sense, and interpreted to mean the interdiction of communication with any person likely to be infected. This appeared from the interpretation clause, sect. 2, which also contained a definition of "local authority," including authorities in villages under the "Village Management Act, 1881," and was clearly not intended to be confined to bodies or boards exercising authority at places on the coast. Proclamation 186 followed the wording of clause 8 of sect. 26, and was clearly within the competence of the Governor. The power having been delegated to the local Board to make regulations "for preventing the spread of the disease," the Board had passed a bye-law "for the detention and isolation of all persons

likely to be infected with small-pox, and for the isolation of houses and premises," and he contended that this was not *ultra vires*. The powers set forth in clause 5 of sect. 32 were really implicitly contained in the body of the Proclamation, and it was unnecessary to mention them specifically.

1884.
March 7.
Thacker vs.
Doyle.

LAURENCE, J.:—The main difficulty is whether it is not clear from the wording of the Proclamation that the only persons the Board of Health has power to isolate and detain are persons coming from the Transvaal into Griqualand West.

Hoskyns, C.P.:—It goes on to say "and for preventing the spread of the disease."

LAURENCE, J.:—The word "and" shews that this means something different from the "detention and isolation" previously mentioned.

Hoskyns, C.P.:—If there is any ambiguity, the Court should adopt that construction which will most effectually carry out the intention of the Act. It is almost impossible to suppose that the spread of the disease could be stopped by isolating people coming from the Transvaal and nowhere else.

Forster, in reply, referred to the definition of quarantine in *Wharton's Law Lexicon*. The whole of the portion of the Act relating to "quarantine" clearly referred to local authorities at ports and harbours, and in those cases only could the Governor delegate his powers under sect. 26, and therefore the Proclamation under which the Local Board had assumed to act was itself *ultra vires*.

BUCHANAN, J.P.:—But the *Crown Prosecutor* has shewn that the words "local authority" refer to any proclaimed district.

Forster:—Sect. 2 says, "The term quarantine includes in its meaning the interdiction of free communication with persons *on land* infected with disease;" I contend that it

1884.
March 7.
—
Thacker vs.
Doyle.

applies only to restricting communications with a ship in port where infectious disease prevails on shore.

BUCHANAN, J.P.:—No doubt it “includes” that meaning, but it may also apply to all infected districts.

Forster argued that, whatever the Governor might do at “any port or place,” it did not include inland places. In sect. 11, which applied exclusively to the quarantining of ships, the word “place” was used, so that it could only refer to the sea-boards.

LAURENCE, J.:—It is clear that the Governor in Council construed the Act as giving him authority to delegate his powers to inland authorities, but no doubt it is possible that this construction was erroneous.

Forster said that in any event the power to detain and isolate had not been given to the local Board. Penalties were enacted for the contravention of regulations made under sect. 32, and the section must therefore be construed strictly.

LAURENCE, J.:—I am unable to concur in the view which my colleagues feel justified in taking of this question. This is a matter involving the liberty of the subject, and also involving the construction of a penal section, and therefore the words of the enactment must be construed strictly. The whole question for the Court to decide is whether there is anything in Proclamation 186 of 1883, promulgated under the Public Health Act of that year, authorising the respondent to detain the applicant in the Kimberley Hospital against his will. The Proclamation in the first place empowers the Board of five persons nominated by Government Notice of even date to exercise certain powers which the Act authorised the Governor to exercise. Whether a Proclamation of this kind made by the Governor—who is obviously not in a position to superintend the ordinary regulations for quarantine at ports, and who is therefore empowered to delegate his authority for that purpose to the local authorities—and purporting to apply to inland places, is or is not

ultra vires, is perhaps a question open to doubt, but it is a point on which I do not think it necessary, for the purposes of the present case, to express any opinion. For, assuming that the Proclamation is itself legal and competent, the question remains, does it authorise the local Board of Health to make any regulation or bye-law under which the applicant can be lawfully detained in Hospital? I am of opinion that it does not. There is an omission in the powers conferred on the Board, an omission which might easily be supplied, but which at present clearly exists. It was competent for the Governor to make regulations, under sect. 32, "for all or any" of the purposes mentioned in the seven clauses of the section. The fifth of these clauses provides "for the detention and isolation of persons suffering from or under circumstances likely to be infected with such disease, and for preventing the spread of disease." The Governor has delegated to the Board the power to make regulations under six out of these seven clauses, but, either deliberately or by inadvertence, the Proclamation has abstained from giving, or omitted to give them, the power of making regulations for the purposes mentioned in the clause I have quoted. That is so with one exception, and the exception is contained in the preliminary portion of the Proclamation, which runs as follows:—"Whereas small-pox has broken out in the Transvaal, and all persons coming from the Transvaal, and all persons travelling along any road leading from the Transvaal into Griqualand West, are likely to be infected with such disease," the Board is empowered "to give directions for the detention and isolation of all *such* persons, and for preventing the spread of the disease, &c." As a question of grammar, there can be no doubt of what is meant by "all such persons." It means persons coming from the Transvaal, and as far as I can see no power is given to the Board to detain and isolate any other persons whatever. In addition, power is given to the Board to take other measures "for preventing the spread of the disease." The question in substance is this: When a special power is given for a specific purpose in a specific case, can the general words which follow be held to give a general power of taking similar measures in every case? That seems a con-

1884.
March 7.
Thacker vs.
Doyle.

1884.
March 7.
Thacker vs.
Doyle.

struction which it is quite impossible to admit. The words “*and* for preventing the spread of the disease” must surely have a meaning distinct from that of those which precede them, and the conjunction must be allowed its due weight. To put the matter concisely, supposing it to be competent for the Board of Health, under the powers delegated to them, to make regulations for all or any of the purposes mentioned in clauses 1, 2, 3, 4, 6, and 7, of sect. 32, and also for the purposes mentioned in the latter part of clause 5, namely, for “preventing the spread of disease;” if the former part of clause 5, referring to detention and isolation, had been omitted, and the latter part referring to general preventive measures had been inserted, how could it be maintained that the words which are alone put in give precisely the same powers as if they had been combined with and added to the words which have been omitted? How can it be contended that the powers which have been given include powers, which, whether deliberately or inadvertently, have not been given? In my opinion no legal justification has been shewn for the course adopted by the respondent in forcibly detaining the applicant in hospital. I do not say that the conclusion at which I understand both of my learned colleagues have arrived may not be a more salutary one in the interests of the community at large; but the question before us appears to me to be a pure question of law, the answer to which cannot be affected or controlled by considerations of expediency, and I am therefore of opinion that this application ought to be allowed, with costs.

BUCHANAN, J.P. :—In deciding a question of this kind we are justified in looking, and indeed it is our duty to look, at the objects which the Act we are required to construe was intended to effect, and there is a well-known maxim, which seems to me very applicable to the present case, *salus populi suprema lex*. It is a recognised canon of construction that Acts of Parliament should be construed liberally, so as if possible to give them all the effect which their framers appear to have had in view. The same principle applies to Proclamations issued by the Governor in Council. The Proclamation before us is no doubt somewhat loosely drawn, as

often happens, but it ought to receive a liberal interpretation. As to the first point which was raised on behalf of the applicant, I think it is clear that the word "quarantine" is used in the Public Health Act in an extended sense, and it must certainly have been intended by the Legislature that the Governor should be authorised to delegate his power of making regulations and directions for dealing with infectious diseases, and promoting the public health, to Boards of Health, and other local authorities at inland places, remote from the seat of Government. This being so we find that the Governor has delegated by Proclamation to the Kimberley Board the power *inter alia* of making regulations "for preventing the spread of disease." Looking at the matter in this light, I am, on the whole, of opinion that the bye-law passed by the Board of Health, on which the respondent has acted, for the detention and isolation of all persons likely to be infected, may fairly be held to fall within their general power of taking measures "for preventing the spread of disease." The balance of advantage is greatly in favour of refusing the present application. On the one hand, the detention of the applicant in hospital for a few days longer can scarcely do him any great harm, and there is nothing to shew us that he will suffer any material disadvantage or inconvenience by such detention. On the other hand, if the inmates of the hospital are allowed free egress at the present moment, there is an obvious danger of a dangerous disease being spread throughout the town, with the most injurious results to the community at large. It is a significant fact, and one which has influenced my mind a good deal in the view I take of this matter, that while there are very strong medical affidavits filed on behalf of the respondent, agreeing in saying that, whatever the precise name or nature of the disease of which cases have been discovered in the hospital, it is at all events a disease of a highly contagious and infectious character, on the other hand there is no medical affidavit whatever filed in reply to these allegations. The character of the disease being thus uncontested, we should be taking upon ourselves a very serious responsibility if we interfered with regulations of which the object is to prevent its spread, and which seem to be proper regulations to make

1884.
March 7.
Thacker vs.
Doyle.

1884.
March 7.
Thacker vs.
Doyle.

with that end in view. The application must therefore be dismissed, with costs.

JONES, J.:—In my opinion, clause 8 of sect. 26 of this Act clearly authorises the Governor to delegate his power of making regulations and directions under the Act to the local authorities, not merely at any port, but at any “place” within the Colony, and it is therefore competent for the Governor, and the local authority which represents him, to make what are commonly described as “quarantine” regulations, that is to say, regulations for the detention or isolation of persons likely to be infected, at inland places, such as Kimberley, as well as at places on the coast. That being so, if we look at the preliminary part of the Proclamation under which the Local Board of Health exercises its powers, I think the object clearly was to provide for the detention and isolation, not merely of persons coming along roads from the direction of the Transvaal, but of all persons suspected of being or likely to become infected. The preamble of the Proclamation does not state only that small-pox has broken out in the Transvaal, but also that the Territory of Griqualand West is threatened with the disease. The person therefore who drew the Proclamation, knowing that the disease had broken out, or was likely to break out, in both places, could hardly be supposed to intend that only persons coming from one of them should be detained or isolated. Although this bye-law at first sight would appear to have been made by the Board of Health as if all the powers under clause 5 of sect. 32 had been expressly conferred on them, on the whole I think it was competent for the Board to make it under their general powers conferred on them by the Governor in the preliminary part of the Proclamation. The respondent has therefore, in my opinion, been acting under the protection of the bye-law, which is valid and binding, and has simply been carrying out instructions framed by the Board which are *intra vires*. I concur with my Lord in thinking that the application must be refused.

Application refused accordingly, with costs.

[Applicant's Attorneys, HAARHOFF BROS.
Respondent's Attorneys, STOW & CALDECOTT.]

O'KEEFE vs. SCOTT.

Jurisdiction of Kimberley Magistrate.—Mandamus to issue summons.—Proclamations 69 of 1871 and 41 of 1872, and Ord. 8 of 1879, G. W.—Act 20 of 1856, Schedule B., Rules 7 and 8.

Where the clerk of the Resident Magistrate of the district of Kimberley had refused to issue summons against a defendant residing at Du Toit's Pan, on the ground that no reason was assigned why the case should not be tried in the Additional Magistrate's Court at Du Toit's Pan, the Court granted an order on the clerk to issue the summons, holding that he had no discretion to refuse to do so.

This was an application for a *mandamus* on the respondent, in his capacity as clerk of the Court of the Resident Magistrate of Kimberley, to issue a summons out of the said Court in a certain action in which the applicant, who resided at Kimberley, was plaintiff, and one Stockberg, of Du Toit's Pan, defendant. The affidavits for the applicant stated that the respondent had refused to issue the summons on the ground that the defendant resided at Du Toit's Pan. The respondent in his affidavit stated that there was a duly constituted Court of additional Resident Magistrate at Du Toit's Pan for the purpose of trying matters of this nature, and that he had been instructed by the Resident Magistrate not to issue any summonses calling upon defendants resident at Du Toit's Pan to appear in the Magistrate's Court at Kimberley, unless the plaintiff shewed some reasonable ground for removing the defendant from the jurisdiction of his own Court, and no such reason was shewn to him in this matter.

1884.
March 11.

O'Keefe vs. Scott.

Forster, for the applicant, said this was really an application for a judicial opinion as to the jurisdiction of the additional Resident Magistrate for the district of Kimberley, sitting at Du Toit's Pan. If the Magistrate of Kimberley has jurisdiction over persons domiciled at Du Toit's Pan, he cannot refuse to try cases like the present. Proclamation

1884,
March 11.
O'Keefe vs. Scott

69 of 1871, creating and defining magisterial districts in Griqualand West, was repealed by Ord. 8 of 1879, sect. 4 of which laid down the boundaries of the district of Kimberley, which included Du Toit's Pan, and had never been altered. The additional Resident Magistrate's Court at Du Toit's Pan was established by Proclamation 41 of 1872, which gave the said Court full jurisdiction in all cases arising within certain portions of the district of Kimberley, but in no way curtailed or abolished the jurisdiction of the Magistrate of Kimberley within those limits.

Hoskyns, C.P., for the respondent, admitted that the Kimberley Magistrate had jurisdiction in Du Toit's Pan cases when he chose to exercise it.

Forster.—Then a magistrate has no discretion as to issuing or refusing summonses when applied for against persons within his jurisdiction, and still less has his clerk any such discretion. He referred to Rules 7 and 8 of Schedule B. to Act 20, 1856.

Hoskyns, C.P.—The question is whether or not the Magistrate of Kimberley has a discretion as to the issue of summonses against defendants residing within the jurisdiction of the additional Magistrate at Du Toit's Pan. The Magistrate here cannot do the work of both places, and if his Court is to be crowded with Du Toit's Pan cases great hardship will be caused to litigants; defendants will be unnecessarily brought up to Kimberley, the despatch of business will be delayed, and the object of the legislature in creating the Du Toit's Pan Court frustrated.

BUCHANAN, J.P. :—The point which has now been argued was practically decided in a case which came before me, I think in November 1880, and which I believe was reported at the time in the local newspapers. The Resident Magistrate of Kimberley has undoubtedly jurisdiction over defendants residing at Du Toit's Pan; and it is quite clear that he has no discretion to refuse to entertain cases where the defendant is within his jurisdiction, and that his clerk has no right to refuse to issue summonses in such cases. There must therefore be an order on the respondent to issue a summons in this case,

and, as costs are applied for, he must be ordered to pay the costs of the application.

1884.
March 11.
O'Keefe vs. Scott.

JONES, J., and LAURENCE, J., concurred.

[Applicant's Attorneys, PALEY & COGHLAN.
Respondent's Attorneys, GRAHAM & GILBERT.]

LONDON AND SOUTH AFRICAN EXPLORATION CO. (LIMITED)
vs. KIMBERLEY TOWN COUNCIL.

Ord. 17, 1879, G. W.—Ord. 40, 1828, sect. 5.—190th Rule of Court.—Valuation of immovable property.—Proceedings of Assessment Court.

By the Kimberley Municipality Ordinance, 1879, Griqualand West, the Town Council is empowered to appoint "one or more competent appraisers" of immovable property within the Municipality; on a valuation being made by them and an assessment roll compiled, it lies open for inspection, after which an assessment Court of the Council sits for the purpose of hearing objections to the valuation, and it is further enacted by sect. 74 that "the decision of the Council upon any objection to any valuation shall be final and conclusive, and shall not be capable of being reviewed or reversed by any Court or proceeding whatever."

The Town Council appointed an appraiser who valued certain waste lands, the property of the applicant Company, which in previous years had been valued at the sum of £40,000, which valuation was alleged to be excessive, at the sum of £633,500, proceeding on the basis that all these lands might be utilised for building purposes. On objection being taken before the Assessment Court, the valuation was reduced to £500,000. Application was then made to the Court to set aside the valuation, on the grounds that it was arbitrary, fanciful, mala fide, &c., and on the ground that the valuator was not a competent appraiser within the meaning of the Ordinance, and on the further ground that

the Assessment Court had acted illegally in sitting with closed doors.

Held: That notwithstanding sect. 74 the Court had power to set aside the valuation, on the grounds that the facts shewed that the respondents had failed to employ a competent appraiser, and that his appraisal was a mere arbitrary estimate and not a valuation at all.

Held also: That the holding of the Assessment Court with closed doors was irregular and improper, though it might not in itself have furnished a sufficient ground for setting aside the proceedings.

1884.
March 12.
" 13.
" 31.
—
London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

The Town Council of Kimberley, acting under the provisions of the Kimberley Municipality Amendment Ordinance (Ord. 17, 1879, G. W.), caused all the property within the municipality to be valued for rating purposes. The sections of the Ordinance material to the present application were sections 70–74, which run as follows:—

- “70. All persons owning or occupying properties within the limits of the municipality, excepting such property as is hereinbefore exempted, shall be liable to be rated on account of such property in such manner and to such extent as is hereinafter provided.
- “71. For the purpose of valuing all and singular the immovable property situate within the municipality, the Council shall and may appoint one or more competent appraisers.
- “72. As soon as any valuation as aforesaid shall be completed, an assessment roll embodying the same shall be compiled, which shall lie in the office of the Town Clerk for the inspection of every owner or occupier of any property included therein, who may, upon all lawful days and at all reasonable times, inspect the same and take extracts therefrom, and the Council shall, by public notice, announce for general information that it will, upon some day and some hour and place to be fixed in such notice, hold a Court for the purpose of hearing and determining objections to such valuation: Provided that such notice shall be published fourteen days at least before the day appointed therein for the holding of such Court: Provided also, that it shall not be necessary in any suit or proceeding for the recovery of any rate, to prove anything further in the nature of due notice of any such valuation as aforesaid than the publication of the notice aforesaid in one or more of the local newspapers.
- “73. Upon the day, and at the place and hour mentioned in such notice, the Council shall hold a Court, and shall hear all objections which may be urged to any valuation by any owner or occupier or other

person on his behalf, and shall inquire into the merits of such objections, and for that purpose may take the oath of any person whom it shall see fit to examine (which oath the presiding member of the Council is hereby authorised to administer), and shall confirm or correct any valuation objected to : Provided that the said Court may be adjourned from time to time upon application made by any person objecting, who shall shew reasonable grounds for not being ready with his proofs, or for the purpose of obtaining further evidence in regard to any case which shall have been partly heard.

"74. The decision of the Council upon any objection to any valuation shall be final and conclusive, and shall not be capable of being reviewed or reversed by any Court or proceeding whatever.

The applicants owned a large amount of property in the municipality of Kimberley. Some of this property had been surveyed and leased as "stands" for building sites, and this portion was occupied by tenants of the applicant Company; the rest of their property within the municipal limits was unoccupied, but the bulk of it was of such a nature that it might be similarly divided and leased if there were a demand for building sites in that portion of the municipality. The Council had appointed Mr. F. A. Peters as valuator, and he had valued the unoccupied portion of the Company's lands lying within the municipality, designating such lands as "unoccupied stands," at the sum of £633,500. This valuation had been objected to at the Court held by the Council in terms of sect. 73. The Council after hearing the objection reduced the valuation to £500,000. The present proceedings were brought to have this valuation declared null and void. The notice of motion set forth the following grounds for annulling the valuation.

- (1.) That F. A. Peters was not a competent appraiser.
- (2.) That the valuation was not a fair and impartial valuation, but on the other hand was deliberately fixed at a sum far exceeding the value of the said property, *mala fide*, and in collusion with the members of the said Council or some of them.
- (3.) That the Court which fixed the valuation at £500,000 did not exercise its discretionary functions in a just and reasonable manner.
- (4.) That the said valuation and amount fixed by the said Court were arbitrary, vague and fanciful, and not according to reason and justice.

1884.
 March 12.
 " 13.
 " 31.
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

1884.
March 12.
" 13.
" 31.
—
London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

- (5.) That the said Court was held with closed doors, and that the deliberations and proceedings thereof were secret and withheld from the public.
- (6.) That no record was kept of the proceedings of the said Court nor of any evidence adduced before the same.
- (7.) That the proceedings were in other respects irregular, illegal, and *ultra vires*.

Forster (with *Hoskyns, C.P.*), for the applicants, having read the notice of motion, was about to read the applicants' affidavits when

LAURENCE, J., inquired whether the Court could go into this application without reviewing the decision of the Council on the valuation, and referred to section 74 of the Ordinance.

Forster submitted that the Court had power to review when the Council, purporting to act under the Ordinance, had exercised their powers in an arbitrary or fanciful way.

The COURT:—Is not that "reviewing"? Do the respondents rely on section 74?

Hopley said that the respondents relied strongly on that section, and he would now *in limine* take the objection to this Court reviewing the decision of the Assessment Court on the valuation.

Hoskyns, C.P.:—This is not really an application to review the valuation, but to have it declared that the provisions of the Ordinance have not been complied with, that there was no valuation at all and no competent valuator, that there was *mala fides* and collusion, and that the Court sat illegally with closed doors.

BUCHANAN, J.P., referred to the 190th Rule of Court and section 5 of Ord. 40, 1828, and held that the affidavits must be heard in order to decide whether or no there had been a valuation in accordance with law.

The affidavits for the applicants alleged that the valuator had divided all their unoccupied land into stands; that, after making certain deductions for roads, contingencies, &c., he had arrived at a balance of 22,000 stands, available for

occupation ; that he had valued these stands at prices varying from £125 to £2 per stand, making a total valuation of £633,500 ; that the so-called unoccupied stands were in reality waste lands ; that the waste lands of the applicants within the municipality had been valued at the last valuation at the sum of £40,000, and that between the time of that valuation and the present one property had decreased in value ; that the manager of the applicant Company, in view of this valuation, attended at the Court to hear objections to valuations on February 22, 1884, but that he was then refused admittance whilst other objections were being heard ; that he afterwards by appointment again attended that Court and was permitted to enter with his solicitor and the sub-manager of the Company, but that the Court refused to allow the solicitor to be accompanied by his clerk, or to allow the surveyor of the Company's property to enter ; that he thereupon protested on the grounds that the proceedings were vitiated and of no force or effect, because the Court was held with closed doors, and he and other ratepayers and also reporters for the press had been excluded from the room in which the Court was held during the inquiry ; [there were two other grounds of protest not subsequently relied upon, and not necessary for the purposes of this report ;] that these objections were then overruled ; that the Company's solicitor thereupon handed in a protest, after which the Company's manager was examined upon oath as to the amount of unoccupied land owned by the Company within the municipality ; after which the Company's solicitor handed in a final protest against the valuation, on the grounds that the Company owned no "unoccupied stands" within the municipality, "stands" being created only when staked out and let ; that the Company owned only 2000 acres of unoccupied land within the municipal limits, upon which it would in no case be possible to create more than 16,600 stands, whereas the valuator had assessed the property as containing 25,000 stands, and that to make the occupation of 25,000 stands possible the population of the municipality would have to be increased by 150,000 souls ; that the Divisional Council had valued all the waste lands of the Company, being about 29,000 acres, at £36,000, on which basis

1884.
 March 12.
 " 13.
 " 31.
 —
 London and
 South African
 Exploration
 Co., Limited, rs.
 Kimberley
 Town Council.

1884.
 March 12.
 „ 13.
 „ 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

the portion within the municipality would be worth £2483 ; that the true principle which ought to guide the valuator was the amount of rental yielded by property ; that all the waste lands of the Company were leased for grazing purposes for £600 *per annum*, of which sum the portion of land lying within the municipality would yield £37 10s. *per annum*, and that therefore the lands within the municipality ought for assessment purposes to be valued at about £312 10s. (*i.e.* by capitalising the rental at 12 *per cent.*, the current rate of interest). The affidavit of the Company's manager further alleged that the facts set forth in the above protest were true and correct. With regard to the value which ought to be put upon the ground he shewed by figures that the value of these lands to his Company for the year for which they had been rated was at the outside £750, but that taking the Divisional Council valuation as approximately correct they would be valued at £2483. It is shewn by other affidavits that the Divisional Council valuers agreed in the main with those of the municipal valuers in all cases except that of the property now in question. Affidavits of two competent valuers, Messrs. Rothschild and Goodchild, described the valuation as out of all proportion to the true value of the lands, and as fanciful and arbitrary in the extreme. Mr. Goodchild and another appraiser, Mr. Mitchell, valued the lands at £10,000 for rating purposes. It was further alleged on affidavit that Mr. F. A. Peters had only recently been appointed a sworn valuator to the Master of the High Court, his previous occupation having been that of a Kafir-store-keeper, and that he had no special qualifications for valuing immovable property. The affidavits also contained some statements with regard to admissions alleged to have been made by the valuator to the effect that he had been in communication with certain members of the Council as to his method of valuation, the object being to shew that there had been collusion and *malu fides* on the part of both the valuator and the respondents.

For the respondents, the affidavit of the chairman of the Assessment Court was read, giving as reasons for closing the doors of the Court, and only admitting such persons as were interested in the objection under consideration, that many of

the objections were of a private nature, and such as the objectors would not like to be made public, and that the room being a small one it would have been extremely inconvenient to allow the whole number of objectors and the general public to be admitted at the same time. The affidavit further alleged that the manager, the sub-manager, the surveyor and the solicitor of the Company were admitted to the Court, but that the solicitor's clerk, who came with the view of taking shorthand notes of the proceedings, was refused admittance; that the evidence of the surveyor, the manager and the sub-manager was taken, after which the Court reduced the valuation to £500,000, which sum the Court considered a just, fair and reasonable valuation. He denied any *mala fides* or collusion or improper conduct on the part of the Court. A joint affidavit by ten members of the Assessment Court corroborated the affidavit of the chairman and denied *mala fides* or collusion with the valuator on the part of any of the Councillors; they considered the sum of £500,000 a fair, just and impartial valuation of the property in question. (The only two Councillors who did not join in the affidavit were, it was alleged on affidavit, absent from Kimberley at the time of the application to the High Court). The affidavit of Mr. Peters, the valuator, stated that he had had considerable experience in valuing immovable property in this territory during the last ten years; that he was a sworn appraiser to the High Court; that he had been in business as a wholesale importer of general merchandise from Europe; that he had in January tendered for the appointment of valuator, and that he had received the appointment without any fraud or collusion or arrangement with any one; that he had tried to obtain information with regard to these lands from the office of the Company, but had been refused; that he thereupon proceeded to value the lands fairly and impartially and without any collusion or instructions from any member of the Council; that he then found out how many acres of unoccupied lands the Company possessed in the municipality, and these he divided into stands rather larger than the usual size; that he then deducted a certain number of stands for roads, contingencies and unoccupied stands, and that he found the balance to be 22,000 stands; that he thereupon made inquiries

1884.
 March 12.
 " 13.
 " 31.
 ———
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

1884.
 March 12.
 „ 13.
 „ 31.
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

to ascertain the value of unoccupied stands and, by referring to a case before the Court in 1882, he found that the present manager, corroborated by the valuator, Mr. Rothschild, then valued stands on the outskirts of the municipality as being worth £200 each, and that he then produced a map shewing that he considered the unoccupied lands as divided into building sites; that the said manager had after much negotiation sold five stands at the extreme limit of the municipality to the Council for a site for a toll for the sum of £500; that in May 1883 he had demanded the sum of £4000 an acre for some of the Company's waste lands, unless the Council removed some native locations from them—at which rate the value would be about £440 per stand; that the deponent had inquired of various occupiers of stands in the various wards as to the prices paid by them for a fifty years' lease of their stands, and that from the information he thus carefully collected he assessed the value of the stands, valuing the most favourably situated with regard to locality and streets at £125, and gradually diminishing the value to £20 per stand, and at one portion of the land he valued 3000 stands as low as £2 each, because he considered their value much diminished by being cut off from the town by a large drain and by the uneven nature of the ground where they were situated; finally he stated that he had taken great pains about the valuation, and that it was *bonâ fide*, proper and just. He attached to his affidavit correspondence and proceedings in Court to shew that the Company's manager had put the valuation upon portions of waste lands by which the present valuator had been partly guided, and also attached the evidence of the manager in a lawsuit against the present respondents, in which he had said that “in the plan sent to the Council” (*i.e.* of certain unoccupied land belonging to the Company) “everything is building sites which is not roads.” The replying affidavits of the manager alleged that he had put high prices on the stands required by the Council for tolls and native locations as he considered that tolls were “obsolete and irritating institutions,” and that native locations were also undesirable things to have on the Company's property.

Hoskyns, C.P., said the applicants had come before the

Court mainly on two grounds: (1) that there had been no valuation at all, according to the proper construction and meaning of the Ordinance, but that a mere fanciful and arbitrary price had been fixed; (2) that if there had been a valuation it was made *malâ fide* and in collusion with the Town Council. An objection had been raised to the proceedings under section 74 of Ord. 17, 1879; but if it could be shewn that there never had been an valuation at all, y val then the section did not stand in the way of the Court declaring that the proceedings had been invalid and that they should be set aside. *Maxwell* says: "Where something is left to be done according to the discretion of justices or other authorities on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the Act, otherwise the act done would not fall within the statute"; and again, "'according to discretion,' means, it is said, according to the rules of reason and justice, not private opinion; according to law, not humour; it is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself; that is within the limits and for the objects intended by the Legislature." The cases there cited which are applicable to the present matter are *Marshall vs. Pitman*, 9 Bing. 601, and *Wilson vs. Rastall*, 4 T. R. 757 (*Interpretation of Statutes*, 1st ed. pp. 100-101). One of the tests applied by the Courts in judging whether discretion has been reasonably exercised was by inquiring whether the person exercising it had followed the rules laid down by his predecessors in office. Here the valuator had departed most widely from the valuation of his predecessors; and it was difficult to believe that such results could have been arrived at without some private understanding between the valuator and the Councillors. The allegations impugning their *bona fides* were strong; but their own affidavits as well as that of Peters went to shew that he was supplied with facts and documents by the Council on which he based his calculations. The General Municipal Act, Act 45, 1882, § 119, shewed how a valuator should proceed to discharge his duty; under that Act he undertakes to value property at the full and

1884.
March 12.
" 13.
" 31.
—
London and
South African
Exploration
Co., Limited. vs.
Kimberley
Town Council.

1884.
 March 12.
 " 13.
 " 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

fair price or sum which it would in his opinion be likely to realise if brought, at the time of the valuation, to a voluntary sale and sold upon the usual terms and conditions. It could not for a moment be contended that these 2000 acres of waste lands would sell for anything like the sum at which they had been valued, and it was alleged that the previous valuation of £40,000 was itself absurdly high. It was upon affidavit and of common knowledge that property had fallen since the last valuation, and yet these waste lands were raised in value to this enormous sum. This alone should throw the *onus* upon the respondents of shewing that the valuation was *bonâ fide* and properly conducted. Peters, without having any guide, had proceeded in an arbitrary way to divide all the area belonging to the applicants into stands of 40 ft. by 60 ft., and then to value them at prices ranging from £125 to £2 per stand. There was nothing to shew where these stands were, except the 3000 valued at £2 each. If all the land now unoccupied, belonging to the Company, were subdivided into stands, there would be only about 16,000, and each of these should be valued separately so that objection could be taken to any individual valuation. The property in question should be regarded as vacant waste land; there was no reason to think it would ever be occupied, and it certainly would not be during the next year, for which alone this valuation was made. He contended that Peters was not "a competent appraiser," and compared his valuation with that of Goodchild, Mitchell and Rothschild, who were all competent men. Peters had tried to explain his valuation in many cases by statements made by Kilgour, the Company's manager, on previous occasions; but if he went on that basis it was no valuation at all; he should have fixed conscientiously what he considered the fair market value, whatever Kilgour might have said. There was another point which the applicants had given as a reason for review, viz., the holding of the Assessment Court with closed doors, which the Council had no right to do. A Court meant a tribunal, to which the public had access. The reasons given for closing the doors were wholly insufficient and unsatisfactory. What "private or confidential" matters could possibly be brought before the Court?

The manager of the applicants was only allowed to enter when his own objection was under consideration, but he had an interest in hearing other objections, and in himself having an opportunity of objecting to other valuations.

1884.
March 12.
" 13.
" 31.

London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council

LAURENCE, J.:—I observe that section 73 permits "any owner or occupier" to object to "any valuation," not merely to that of his own property. No doubt every owner has a certain interest in the property of others not being assessed at too low a figure.

Hoskyns, C.P.:—Here the Court kept no record of the proceedings. [LAURENCE, J., referred to section 64 of the Ordinance]. There is nothing to shew by what process or on what principle the reduction to £500,000 was made, or on what stands the reduction was made. Moreover there ought to have been a record, because the Court examined witnesses on oath, and the object of administering the oath is to render witnesses who give false evidence liable to prosecution for perjury, and for that reason alone there should be a record.

Hopley (with him *Levey*), for the respondents, submitted that the application was really for a review of the valuation arrived at by the Assessment Court, and that the allegations of *mala fides*, collusion, &c., were made to induce the Court to listen to the application in spite of section 74. The affidavits too on which the applicants relied were in many respects misleading and contradictory. They said in one place that only 16,000 stands could possibly be created on these unoccupied lands, yet when they wished to shew that the necessary increase of population to occupy them would have to be enormous, they calculated as if there were 25,000 stands. Proceeding next to the various points taken by the applicants, and first to the objection that the Assessment Court kept no record, he contended that there was no obligation to do so. It was not a Court of Record, but more of the nature of an inquisition or an inquest; as a fact the results of the deliberations were kept recorded, but it would be most inconvenient and unnecessary to keep an exact record of all the evidence given with regard to every paltry objection which was raised to valuations. Moreover there

1884.
 March 12.
 " 13.
 " 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

was no obligation of law compelling the Court to administer the oath to witnesses, or even to examine witnesses; by section 73 they had the power to do so if they thought fit, but that was all. Again, the applicants objected to the proceedings of the Court on the ground that it was held with closed doors, but they had not shewn that they were in any way damnified or prejudiced in consequence. In spite of the provisions of the Charter of Justice that the proceedings of superior Courts should be in open Court, there was nothing to prevent the Supreme Court from sitting with closed doors if the nature of the case under consideration demanded the adoption of such a course; and the Assessment Court sitting to assess values of property confidentially had a right to conduct the inquiry privately, as the income-tax was assessed in England. If the applicants' manager had demanded to be present at any other valuation to raise an objection on his own or any other rate-payer's behalf, no doubt he would have been admitted, but he had not done so.

BUCHANAN, J.P.:—The general public have a right to be present.

Hopley:—The Court here acted *bonâ fide*, and in the exercise of their discretion, and consulted the public convenience in the course adopted. Moreover, the public cannot as of right enter all Courts; in the present case any one who wished to enter for the purpose of taking part in any objection would have been allowed to do so; but there was nothing to compel the Court, not being a Court of Record, to allow a shorthand writer to come in and take notes of their proceedings.

LAURENCE, J.:—Are the Mining Board Assessments held with closed doors?

Hopley did not know what their practice was; but he contended broadly that in any Court whatever the admission or exclusion of the press or the public was within the discretion of the Court itself, and referred to *Garnett vs. Ferrand*, 6 B. & C. 611; *Paterson's Liberty of the Press*, i. 125.

Prejudice ought to be shewn by the applicants before proceedings could be invalidated on a ground like this. In *R. vs. De Klerck*, Buch. 1870, 9, where the liberty of the prisoner was at stake, the Court held that an informality which caused no prejudice was no ground for invalidating the proceedings in a criminal trial. The only exclusion of which there was any evidence before this Court was that of the shorthand writer, and it did not appear that he was a ratepayer, or that he went to urge an objection on behalf of any owner or occupier, or that his exclusion in any way damaged the applicants. The next points were the allegations of fraud and collusion. [The COURT intimated that it was unnecessary to go into these charges, as there was not sufficient evidence to substantiate them.] He then proceeded to argue on the competency of the valuator, and maintained that there was no real evidence of his incompetency for the office. He had been described as a draper and as a Kafir-store-keeper, but that was by Mitchell and Goodechild, who had themselves tendered for the post and been disappointed. Mr. Peters had been a merchant with an extensive business, and had had considerable experience in dealing with immovable property in Kimberley. He did make a valuation on the basis described by him in his affidavit, and after patient investigation of the true value of that class of property. That valuation it appeared was based on the assumption that a certain number of stands could be created on the unoccupied lands of the Company; but when Kilgour, the Company's manager, gave evidence on oath as to the number which in his opinion could be laid out, the Assessment Court reduced the valuation to the present amount.

LAURENCE, J.:—Is it not clear that the so-called valuation was on the basis of its being feasible to allot all the “unoccupied stands,” on an hypothesis involving the multiplication of the population five or six-fold?

Hopley:—Kilgour himself said on oath in a former case that unoccupied lands within the municipal limits, not dedicated as roads, must all be considered and valued as

1884.
March 12.
„ 13.
„ 31.
—
London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

1884.
 March 12.
 „ 13.
 „ 31.
 ———
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

building sites. Moreover, the true basis of value was not the rental yielded, for valuable building or agricultural or pastoral land might be kept idle by the owner, or might be leased at a nominal rent; a large owner of house-property might have several houses or a street of houses unoccupied. Similarly, in the present case, a large proportion of these unoccupied lands might at any time be leased for purposes of building or of market-gardening. He again contended that the application was merely for a review of the valuation of the Assessment Court, which the Court had no power to do. If the Company had been aggrieved they had a remedy, but not on motion. They might bring their action to set aside the valuation, and might then substantiate their allegations of fraud and collusion. If they could do that, most assuredly the valuation should be set aside, but it was not competent for the Court to grant the present application.

BUCHANAN, J.P., referred to section 18 of the Wines and Spirits Ordinance of 1851, in spite of which section the Courts had interfered in the matter of licences.

Hopley knew of no cases where, there having been no informality or *ultra vires* proceeding by the Licensing Court, the Superior Courts had favourably entertained applications for review in these matters.

LAURENCE, J., referred to *R. vs. Heydenryck*, 2 Buch. E. D. C. 248.

Hopley :—That was really a case under the 33rd section of that Ordinance, where the Licensing Court had been acting clearly *ultra vires*, and had introduced class legislation not authorised by the statute.

JONES, J. :—But we know that there are many cases where the Supreme Court has set aside the proceedings of the Licensing Courts.

Hopley :—If that be so, it must be because of irregularity in the proceedings, or of *mala fides* or acts *ultra vires* on the

part of the Licensing Court. The Legislature must have meant something by these sections, and for sufficient reasons placed these extensive powers in the hands of the Licensing and Assessment Courts. There are no reported decisions available under the 18th section of the Wines and Spirits Ordinance, but it is said that the Supreme Court refused to entertain an application in a peculiarly hard case, *Munks vs. Cape Town Licensing Board*, holding that under that section the power of interference was taken away from them. He submitted that, though the Court might think the present valuation high, they could not interfere, as the proper judges constituted for the purpose by the Ordinance had already finally decided the matter.

Hoskyns, C.P., in reply, contended that there had been irregularities and acts *ultra vires*, and that there had been no valuation, but only an absurd estimate. He referred to *Wharton's Law Lexicon*, *sub voce* "Value."

Cur. adv. vult.

Postea (March 31),—

BUCHANAN, J.P., said:—This is an application by the London and South African Exploration Company against the Town Council of Kimberley, in which application the notice of motion, to follow its precise terms, prays an order declaring that the valuation of the property belonging to the applicant Company, and the amount at which the same was fixed by the Town Council Assessment Court, held on the 25th February, 1884, shall be null and void and of no effect whatever, on certain grounds stated below. The facts are, that under and by virtue of the provisions of the Kimberley Municipal Amendment Ordinance, No. 17 of 1879, all persons owning and occupying properties within the limits of the municipality (excepting certain property specially excepted) are liable (under section 70) to be rated on account of such property in such manner and to such extent as in the Ordinance provided. For the purpose of valuing the immovable property the Council is authorised to "appoint one or more competent appraisers" to assess

1884.
March 12.
" 13.
" 31.
London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

1884.
 March 12.
 " 13.
 " 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

property (section 71). The assessment roll embracing such assessment is (section 72) to lie at the office of the Town Clerk for inspection of owners and occupiers of property, and the Council is then to hold a " Court " on a certain day for hearing and determining objections to such valuation, at which time and place the Council shall hear all objections urged against any valuation pier or or occu any owner by other person on his behalf, inquire into the merits of the objection, and, if need be, take the oath of any person it deems necessary. The Town Council appointed Mr. F. A. Peters, who framed a valuation roll, which lay at the office of the Town Clerk in accordance with the provisions of the Ordinance. On 22nd, 23rd, and 25th February a Court was held to hear and determine objections. Certain immovable property of the London and South African Exploration Company was valued at £633,500 by the appraiser, but reduced to £500,000 by the Assessment Court. This property had been valued in 1880 at £40,000; in 1881 at £50,000, but reduced on objection to £40,000, the standard of £50,000 being thus rejected on consideration; in 1882 at £40,000, and no attempt apparently to re-raise; in 1883 at £40,000, no attempt then either. But in 1884, with a bound, they are ultimately valued at half a million sterling, instead of half a hundred thousand pounds; an increase thus of £460,000, or eleven-and-a-half-fold. To this valuation the London and South African Exploration Company object in the present proceeding, basing the prayer above recited on the following grounds: (1) That Mr. Peters was not a competent appraiser; (2) that the valuation was not a fair and impartial valuation, but deliberately fixed at a sum far exceeding the value of the property; (3) that the Court which reduced the valuation to £500,000 did not exercise its discretionary functions in a just and reasonable manner; (4) that the valuation and the amount fixed by the Court was arrived at in an arbitrary, vague, and fanciful manner, and not in accord with reason and justice; (5) that the Court was held with closed doors, and its deliberations were secret and withheld from the public; (6) that no record was kept of the proceedings nor any evidence adduced; (7) that the proceedings were in other respects irregular.

illegal, and *ultra vires*. An objection was taken at the threshold of the application that this Court is barred from reviewing the valuation or hearing an appeal as to it. This objection was founded on the provisions of the 74th section of the Municipal Ordinance 17 of 1879, the exact terms of which are these: "The decision of the Council upon any objection to any valuation shall be final and conclusive, and shall not be capable of being reviewed or reversed by any Court or proceeding whatever." Now these are certainly very strong and clear words used by the Legislature. I can find no other Colonial Municipal Ordinance in which what is with justice regarded as one of the first rights of the subject, a fair right of appeal against alleged wrong, is taken away or restricted. In the General Municipal Ordinance 9 of 1836, sections 25 and 32, the ordinary right of appeal is, on the contrary, in terms contemplated and provided for. In the Act 1 of 1861, the Capetown Municipal Act, section 80, the express right to bring any valuation of immovable property with which the owner or the occupier is dissatisfied "in review before the Supreme Court" (those are the words), is in terms given, *et vide* section 83; and so, in the further amendments of that Ordinance, and in other different Municipal Ordinances of the Colony which I have seen. Of course I allude to this allowance of the right of appeal elsewhere only for the purpose of saying that we cannot therefore be assisted with any of the decisions of the Colonial Courts, as those Ordinances give and do not exclude appeal upon such a matter as the present in regard to Municipal Ordinances. As what we have to do is to try and arrive at the object of the Legislature, it would be undoubtedly of aid to us if we had any such decisions. But we have the analogous provisions of the Wine and Spirit Ordinance of 1851, section 18, which recites: "And be it enacted that the decision of every such Court in regard to the granting or refusing of any application for a licence which shall be laid before such Court shall be final and conclusive, and shall not be capable of being brought in appeal or review before any other Colonial Court or authority whatever." The words of these sections it will be seen on comparison are very similar. There is a slight

1884.
 March 12.
 „ 13.
 „ 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

1884.
 March 12.
 „ 13.
 „ 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

distinction of verbiage it is true, but the meaning in both cases is the same. In one of the last Acts of the Legislature in regard to the Liquor Licensing Law, Act 28 of 1883, there was originally a clause allowing an appeal. That was struck out; but there have as yet been no decisions under that Act either to guide us. It is thus of importance to inquire whether under the old Ordinance the Courts of this Colony have, notwithstanding the section cited, entertained an appeal or review from a decision of a Licensing Court, and under what circumstances. The Courts, we readily assume, will never act contrary to the will of the Legislature, but in some cases they are placed in the difficult position of ascertaining its exact object in some of its enactments passed, perhaps, quickly or in the moment's heat. Now among the reported cases is *inter alia* the following: *Queen vs. Heydenryck*, 2 Buch. E. D. C. 248. There the Licensing Board of Jansenville had imposed a condition in granting a licence that the sale of liquors should be restricted to Europeans only. The licensee took his licence under protest, but sold to a native with the view of having the question tested. The Resident Magistrate convicted him, holding "that to have gone into the defence that the restriction was *ultra vires* would have been to review the decision of the Licensing Board, which decision by section 18 of Ordinance 9 of 1851 was final and conclusive, and not capable of being reviewed." This is therefore in point. The defendant appealed, and the Eastern Districts Court reversed the Resident Magistrate's decision, and in effect struck out the condition of the licence, holding that the Board had no power to impose the restriction in question, and to draw a distinction never contemplated by the Legislature. The *Solicitor-General* appeared for the Crown, and although of course perfectly acquainted with the provisions of the Licensing Law as to no appeal or review, never disputed the Court's right; and the whole of the judgments and the finding go on the assumption of the Court's right under these circumstances, the statute notwithstanding and the Magistrate's special reason notwithstanding. We have also been referred *inter alia* to the following unreported cases: *Kannemeyer's Case*, in which the

Supreme Court reversed the decision of the Capetown Licensing Court; *Munk's Case*, in which it would not interfere; the Clifton House or *Goderson's Case*, in which the Supreme Court also reversed the decision. But notwithstanding our endeavours we have not been able to get the exact particulars in time, and it is, I think, unsafe to rely much on them in detail, except in so far as my brother JONES may be able to go upon what happened in his hearing at the bar, or in cases in which he was of counsel. The reported cases, although meagre, are sufficient to shew that, broadly stated, it is clearly within the power of the Courts of the Colony, even where the statute has denied a right of appeal, to consider, and if need be set aside, the proceedings of Licensing Courts on the ground of irregularities of procedure and acts *ultra vires*. Indeed during the arguments of this particular case, while it was for the applicant admitted on the one hand that there is no ordinary right of appeal, it was, for the respondent, admitted that for irregularity and *ultra vires* review is possible. So also, of course, for fraud or collusion. The first question then is (assuming for the moment that we are otherwise barred by the statute), Was anything done *ultra vires*? For the purpose of deciding that, we were compelled to hear the affidavits on both sides in order to arrive at what actually took place, it being manifestly necessary to know exactly what did take place before any opinion could be formed as to whether there were or were not irregularities of procedure. I may here record at once, as to the heading of the notice, that the Court during the argument intimated that it found no sufficient evidence of such bad faith on the part of the Council as is suggested in the affidavits for the applicant, viz., that the alleged valuation was arrived at by collusion between the Councillors, or some of them, and the valuator. Considering next, in passing, the sixth heading of the application, that no record was kept of the proceedings of the Court, or of any evidence adduced before it, it is clear there is no such obligation by statute, however desirable such minutes and records undoubtedly may be. Section 64 of Ord. 17 of 1879 imposes the duty of keeping minutes to be read at succeeding meetings of the Council, referring thus,

1884.
March 12.
" 13.
" 31.
—
London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

1884.
 March 12.
 „ 13.
 „ 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

as the whole context of the Ordinance shews, to Council meetings only ; and the obligation, *e.g.* of minutes at public meetings of ratepayers, was considered by me in the Electric Light case in this Court last year, but ruled against, however desirable. Headings 2 and 6 thus fall away. I prefer next to take heading 5, that the Court was held with closed doors, and that the deliberations and the proceedings thereat were secret and withheld from the public. This is one of the grounds, although I do not base my judgment entirely on it, on which I think it is competent for us to entertain this application, and on which it, in my opinion, must succeed. The 72nd section of Ordinance 17 of 1879 requires that the holding of the Court shall be “announced” for general information and by public notice, and the day and hour and place fixed in such notice. The notice is to be a fourteen days’ notice and published in the local newspapers, and that calls on all who can raise objections to appear, viz., the ratepayers as a body. Now, if such notice were not given, or insufficiently or improperly given, the proceeding would be open to review. The Appeal Court, *e.g.*, would have set aside the whole proceedings in the Electric Light case had the advertisement not been found in the *Gazette*. How then if the proceedings are held, even to any extent, with practically closed doors ? What is the object of publicity being insisted on and with such minute regulations ? Besides the general grounds on which the publicity of all Courts is necessary, there is the special reason in this case that, under the 73rd section, any owner or occupier may urge any objection, not merely therefore to the alleged valuation of his own, but of all other premises, or any other person may do so in his behalf. And if such persons are found to be excluded from any portion of the proceedings, it seems to me to follow that their legal rights are assailed, and either injury may as a fact be done, or there may be a reasonable ground for so supposing, in either of which cases the aggrieved party is entitled, under certain circumstances, to a remedy. Now, what took place is shewn by the affidavit of Mr. Kilgour, the local agent for the London and South African Exploration Company, which is not denied, although endeavoured

to be accounted for, as we will presently see. He applied for admission on the 22nd February, the first day on which the Court sat, but was utterly refused, while other objections were being inquired into. Was it allowable and important for him to attend? Allowable clearly by the very words of the Ordinance, important without doubt, for it might have given him considerable *data* for the due consideration of the alleged valuation and proper putting forward of objections when the time came, if he were present during the hearing of objections to valuations, *e.g.* of the neighbouring properties (say of Councillor Grever), and had an opportunity of noting and studying them. Afterwards he again attended and was permitted to enter with his solicitor and sub-manager, but the Court refused to allow his solicitor to be accompanied by his clerk or to allow the surveyor of the Company's property, a most important officer, who, we may assume, would be keenly alive to and intimately acquainted with everything done, to enter with Mr. Kilgour, on one day, at all events. As was only to be expected, a written protest was handed in, but overruled. That protest was, *inter alia*, based upon the proceeding of the Court being irregular and *ultra vires* on the ground *inter alia* that it was held with closed doors, and that the protester and other ratepayers and also reporters for the press were excluded from the room in which the Court was held during this inquiry. This protest being overruled, the work proceeded. I do not here notice at the moment what further took place, but have to inquire whether such proceedings as those above described can be legal and are subject to review? In my opinion the exclusion of the least ratepayer who wished to object to the valuation of his own property or of others would have been illegal, but *à fortiori* the exclusion of a ratepayer representing, in all, a rated million (the other £400,000 is not now objected to) of the whole value of the municipal immovable property; and the difficulty is further seen by noticing that when Mr. Kilgour entered the rest of the ratepayers are excluded, as he was excluded while they were individually in. Councillor Wolf, who presided over the Court, gives as the reason for the closing of the doors and only admitting such persons as "were from time to time interested in the

1884.
March 12.
" 13.
" 31.

London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

1884.
 March 12.
 „ 13.
 „ 31.
 ———
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

valuation of property” that many objections were necessarily of a “private and confidential nature,” and such as “the objector would not care to have made public”; that the room in which the Court was held was not very large, and that there was a great crowd of people waiting outside, and it was thought that if the doors were left open and the crowd admitted it would retard the business of the Court, which, as it was, lasted three days. He states further that the surveyor and solicitor were admitted on the second day, as I gathered. But I must say (with every desire to give the Councillor presiding over that Court the latitude of his own views) that it indeed surprises one to understand how, in the proceedings of such a public body as the Town Council at such a Court, there can be anything of so “private and confidential a nature.” What transpires is as to public property and regards the right of the public. What the one ratepayer regards as of a private and confidential nature may be exactly that on which the excluded ratepayer might wish to object. As to the room, there is no evidence that the largest room available (the commodious Town Hall for instance) was used; and as to crowding, if the best Court-room, whatever it was, was filled, that would be a good reason; and by arranging to take the valuation in wards, say a ward or two each day, crowding might be avoided. Nor was the closing of the doors, which I think was, to say the least of it, an unfortunate occurrence, matter of the moment only—something done in the hurry and regretted afterwards—but it was persisted in, and strongly pressed at the bar, that what was done by the Assessment Court was done as of right, which makes it the more important for future precedent. We were referred to the case of *Garnett vs. Ferrand*, 6 B. & C. 611 *et seq.*, but a perusal of that case shews (and it was the only noticeable case cited on the point), that it was a totally different case to the present. It simply decided that trespass cannot be maintained against a coroner for turning a person out of a room when he, the coroner, was about to take an inquisition. Now, there is no analogy between a coroner’s inquest and a Town Council Assessment Court that I can see. It is easy to understand how a great discretion must necessarily be vested sometimes

in presiding judges for general purposes, public morality, decency, and order, and for excluding individuals on those grounds, and how a great discretion must necessarily be also vested in a coroner who is sitting on the view of a dead body, at a purely preliminary examination on the attendant circumstances of death, which, for certain reasons, it may be important not to disclose. But there is a great difference between excluding one or two individuals for such pressing reasons and excluding numbers of ratepayers while other objections are considered. The person excluded in *Garnett's Case* (page 614) was "not summoned, nor accused, nor suspected, nor a relative of the deceased, nor even an inhabitant of the village where the body was found." As little could any one claim admission to a Grand Jury, as the case points out. Lord Chief Justice TENTERDEN, in delivering judgment, said: "Now, it is obvious that a coroner's inquiry ought for the purposes of justice in some cases to be conducted in secrecy. It is a particular inquiry, which may or may not end in the accusation of a particular individual. It may be requisite that the suspected person should not at so early a stage be informed of the suspicion that may be entertained against him and of the evidence on which it is founded, lest he should elude justice by flight, tampering with witnesses, or otherwise." These clear considerations shew there is no analogy. "In the one case," proceeds Lord TENTERDEN, "many things might be disclosed to those who are to decide, the publication whereof to the world at large may be productive of mischief without the possibility of good." Who can conceive that this would possibly apply to the proceedings of a Municipal Assessment Court, where those who seek admission are part of the body corporate, deeply interested in its proceedings, and who are refused at a certain stage of the inquiry, at all events, access to a town-building, where they come as ratepayers demanding a right to enter for an important business purpose? I see for my part a great possible danger to the interests of ratepayers from such closed-door proceedings, which, if unchecked or approved, may grow, from which, too, not only parties interested, but the press, are excluded. I see an interference with the openness of public proceedings: and by my decision in this matter

1884.
 March 12.
 " 13.
 " 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

1884.
 March 12.
 " 13.
 " 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

desire to reacknowledge and reaffirm what is a great principle—aye, greater even than the interest of this particular applicant, large as that is—the principle that (save in a few cases non-analogous in any respect to the present) the proceedings of a Court should be open to that “fierce light” which is a necessary concomitant of public proceedings, and one of the greatest safeguards to their purity and regularity; a principle which but for what has occurred in this case I should have thought needed at this day no reaffirmation, but would have commanded the readiest assent. And a public body like the Town Council of Kimberley should be most careful in not only repressing secrecy but courting inquiry; for by an opposite course ideas are raised which may be unfounded. But it may be said, the closed doors assumed, the applicant now before the Court suffered no injury or prejudice. In the first place, it is not at all clear to my mind he did not (witness in part these very proceedings), and in the second place it is sufficient in some cases if there were a reasonable supposition that such prejudice would follow. But while I regard this session of a Court with closed doors as ill-judged, and a proof of irregularity in these proceedings so as to make them competent to be set aside on that ground, I need not base my judgment entirely on it, for the other proceedings I find also to be in some respects irregular, as I view them. There is no doubt the difficulty as to some of the heads of the notice of motion, that to dispose of the motion on them would be open to the view of acting contrary to the section, and of reviewing the valuation itself. But not so as to others. It is essentially necessary to bear in mind the difference between objections to principles of valuation and objections to particular valuations. While I think it was the object of the Legislature to prevent ratepayers rushing to Courts of law on points of detail, and rightly so, I do not think it was the intention of the Legislature to prevent appeal or review where principles were breached, which breaches shew the incompetency of the valuator, and the fact that, so far from “valuing,” in the right sense of the term, he has not “valued” at all. We find here (independently of the valuation being officially committed to one person only where the statute allowed it to be done by more

persons than one, which one would have thought at all events not an unadvisable proceeding considering the largeness of the interests at stake) that there is no proof of a valuation, in the right sense of the word, having been made; there seems rather on the affidavits to have been a non-valuation. While we might be precluded, say, by the terms of the section from reviewing any objection to the valuation of a particular house on Market Square—whether its value should be £500 or £600—it by no means follows that when it is clear, as it is to me, on the affidavits that the appraiser was not competent for the purposes for which he was appointed, and moreover so fanciful as to raise the amount on the roll from £40,000 to £630,000, we are by the statute prevented from saying there has been no valuation at all. Supposing the valuation had, for argument sake, gone so wholly *ultra* as to have fixed ten millions, is there to be no relief? It is not, as it seems to me, the mere fact of his taking and grasping certain figures which makes what he does a valuation; a valuator must be a valuator indeed. A non-valuator cannot be a valuator. The two things are their opposites. Municipal valuation means, in the terms of the Municipal Valuation Act, a valuation on the basis of what would be arrived at by a valutory sale at the time. Can any one say fairly that £633,000 is that amount, especially in these most depressed times, when realisation is very difficult, often impossible. The Council itself evidently thought there was something excessive, for it reduces the amount by a sudden bound, somewhat similar to the valuator's, of £133,000, which reduced sum in itself of £133,000 is three times the sum applicants' grounds were ever valued at before. The affidavits on record of Mr. G. Kilgour and Mr. H. S. Caldecott are in some respects (I by no means say in all) so cogent that I am content to refer to them merely instead of quoting or summarising them. They are indeed, to use a homely expression, as full of stubborn facts as an egg is of meat. One asks oneself if it has taken so many years to have 3000 stands in or near Kimberley occupied, what possible reason is there for supposing that in the years of grace 1884-5 the number of these stands will so increase, or that even the unoccupied stands will be 45,000; that 18,000 will

1884.
 March 12.
 „ 13.
 „ 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

1884.
March 12.
" 13.
" 31.

London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

be required for roads, or 2000 (almost equal to the present number occupied) needed for that mysterious heading "Contingencies," which seem to be sometimes resorted to in figures when figures fail of their proper and precise effect. Why assume that the population of Kimberley must this year increase from 25,000 to 100,000 or 150,000? The object of the valuation is to get at the rates for 1884-5 only, not for A.D. 1900, or the millenium. And if the alleged valuation is on the principle, in fact, of a 10, 20, or 30 years hence valuation, or of a period that may never arrive in the history of Kimberley (much as we believe in its recuperative power and continued progress), then the whole valuation is, without for a moment going into minute details, so fanciful and arbitrary on the face of it that, *as a valuation*, it cannot stand. The Council is required to appoint a competent appraiser, that is, competent for this large work. If it had appointed *e.g.* one who had never appraised in his life, that would be a ground for review, not of the valuator doubtless, but, be it always noted, of the competency for valuation. To judge of the competency you *must* make certain inquiries, on main and salient points. And can he be a competent valuator who has done what I have sketched above, or who departs so outrageously from another known standard, the Divisional Council valuation, which is but £36,000 for the whole of the 29,000 acres of which the London and South African Company's property consists, and only about 2000 of which fall under Mr. Peters's valuation? Mr. Kilgour's valuation, if we were inquiring into *his* valuation, might be in some respects as fanciful on the one hand as this alleged valuation is on the other; but that is not the point now before us. Examining, then, what has been done by the light of Mr. Peters's own explanation of it, it is to me unintelligible, *on principle*; and this is also shewn by the affidavits of Messrs. Goodchild and Rothschild, well-known appraisers, and Mr. Mitchell. Mr. Peters begins by dividing at once all the unoccupied stands into "stands," and all I do is, in fact, to stop him at the threshold of the inquiry as to value he further prosecutes on *that* basis, and say: "You are wrong there." He takes plaintiffs' own estimates in damage actions they bring. If that were done in every case, judging

by some cases we have had in this Court, plaintiffs would get more £50,000's than they get £50's. Is that a right principle of valuation? I should say, as a rule, that a plaintiff's own summons estimate of his damage is in most cases the last thing he will get. From exceptional values of toll-bar or location sites he declares general values, to an extent. He takes, too, a very limited time for a very difficult work, which is rendered more difficult by the absence of information. He imagines increases of population at a rapid ratio which a Malthus never dreamt of. He lays out building "sites" unequalled even in Eden—of course I allude to Dickens's 'Martin Chuzzlewit'—some chapters in which might well be read in connection with this present case. He creates demands for what there is no demand for. Valuating at a period of unprecedented depression, he seems to ignore all depression. Indeed, the constant impression the study of this application makes upon me is that the alleged valuation would be laughably ridiculous were it not so serious to the applicants. As generally speaking he (Mr. Peters) so acts as to make it impossible to say that he has competently valued, or valued at all, I am therefore of opinion, on the grounds of the Assessment Court's own proceedings, and the grounds just stated, that the applicant must succeed, and the order of the Court will be "that the alleged valuation of applicants' waste lands of £500,000, in the application mentioned, made by respondents on 25th February, 1884, be set aside with costs." I cannot refrain from adding, as a Judge who has sat in several suits and applications between the Town Council and the Exploration Company, and who has always advised in the interests of both a principle of fairness on both sides, in the difficult circumstances in which both are undoubtedly at times placed, that although the applicants may seem to respondents at times arbitrary in their demands, if such valuations as these are attempted no good can result.

JONES, J.:—In view of the very strong terms of section 74 of Ordinance No. 17 of 1879, I confess that I have felt grave doubt as to the powers of this Court to interfere and remedy what is obviously a gross injustice to the applicant.

1884.
 March 12.
 " 13.
 " 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

1884.
March 12.
" 13.
" 31.

London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

By this section it is enacted that "the decision of the Council upon any objection to any valuation shall be final and conclusive, and shall not be capable of being reviewed or reversed by any Court or proceeding whatever." We are aware, however, that the Supreme Court has in several cases exercised its jurisdiction when gross irregularities have occurred, in spite of the strong words used in the 18th section of Ordinance 9 of 1851. It was in that section enacted that the decision of every Licensing Court "in regard to the granting or refusing of any application for a licence which shall be laid before such Court shall be final and conclusive, and shall not be capable of being brought in appeal or review before any other Colonial Court or authority whatever." These powers were no doubt exercised under the wide provisions of the Charter of Justice. "The old rule for jurisdiction," laid down by Baron ALDERSON in *Stanton vs. Styles*, 5 Exch. 583, is "that nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which especially appears to be so; nothing is intended to be within the jurisdiction of an inferior Court, but that which is expressly alleged." *Boni iudicis est ampliare iurisdictionem*. I do not say that this Court would interfere where its jurisdiction has been specially excluded, but when its jurisdiction has not been definitely excluded this Court is bound *remedium dare ubi iniuria*. I do not consider that its jurisdiction would be excluded where the lower Court had distinctly refused to exercise its functions, or attempted to act in a manner not provided for or allowed by the Ordinance conferring powers upon it; or under the guise of exercising the powers it possessed had obviously used no discretion whatever, but had made use of its judicial powers for the purpose of merely benefiting the Corporation without reference to the true intent and meaning of the Ordinance. It is urged that the Council have made a fair and *bonâ fide* valuation. But would any impartial person looking at the facts come to such a conclusion? Would any reasonable being, with every wish charitably to suppose that the members of the Council would act equitably, honourably and justly, come to the conclusion that in the particular instance before us it had performed its functions in a proper and regular manner?

ERRATUM.

In Part II., p. 359, lines 27 and 29, *for* “£50,000” *read* “£50.”

I confess that I cannot arrive at such a conclusion. What are the facts? It is provided by the 71st section of the Kimberley Municipal Amendment Ordinance that "for the purpose of valuing all and singular the immovable property situate within the municipality, the Council shall and may appoint one or more competent appraisers." The municipality selected Mr. Peters, who has clearly shewn himself incompetent to perform the duties imposed upon him. Without experience he is called upon to value a large estate. He immediately proceeds to cut it up into lots of 60 by 40, and, without considering the possibility of there being a market for such lots, he estimates the value of some 25,000 such lots as if they were capable of being sold at once. The result at which he arrives is as absurd as the data upon which he made his calculations. The property, a portion of that which for Divisional Council purposes is valued at £36,000, and in previous years by the Kimberley Town Council at £50,000, is valued by Mr. Peters at no less a sum than £633,500. By some mistake the whole of the waste lands of the London and South African Exploration Company in Ward No. 4 were not included in the valuation. This mistake the Council had no objection to remedy, and then—though they had reduced the valuation of many other properties, owing to the value of landed property here having decreased—they fix the valuation of the Exploration Company's lands, which produce at present to the Company the annual rental of £50,000 per annum, at the enormous sum of £500,000. I do not say that the fair market value of the property is at all represented by an annual rental of £50,000; but no explanation whatever has been attempted by the Council for the sudden rise in value of the Company's property to ten times its previous value. I can only say that I see in the Council's and Mr. Peters's conduct no real attempt to value the property at all. If a mere error of judgment had occurred on the part of the Council, I think this Court would have refrained from interposing its jurisdiction, though it is not necessary to decide this point now. But when no attempt whatever is made to value upon any reasonable basis the applicant is entitled, I think, to ask for a remedy for the injustice done. The conclusion at which I have arrived is

1884.
 March 12.
 „ 13.
 „ 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

1884.
 March 12.
 " 13.
 " 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

that the *valuation* was deliberately fixed at an amount far exceeding the true or possible value of the waste lands at the present time. It has been urged that the Court should have been held with open doors. For myself, I think that it was never intended by the Legislature that this Assessment Court should be a species of secret inquisition. The Ordinance does provide in section 73 "that the Council shall hold a Court, and shall hear all objections which may be urged to any valuation by any owner or occupier or other person on his behalf, and shall inquire into the merits of such objections." It is not said that only the owner or occupier of the particular property, the valuation of whose tenements or land is under consideration, shall be permitted to be present and object; but the Council has taken upon itself to exclude every person except the particular individual the valuation of whose property is being debated, and those who assist him. I do not wish to rest my judgment upon this fact alone; but its existence tends to shew the nature of the proceedings of the Council upon this particular occasion. The tendency of modern thought and judicial decision is in favour of the utmost publicity being given to the proceedings of our Courts, except where the interests of public morality and justice absolutely require a different course. Sir GEORGE JESSEL, M.R., in *Nagle-Gillman vs. Christopher*, 4 L. R. Ch. D. 173, expressed a strong opinion that the High Court of Justice in England "had no power to hear cases in private even with the consent of parties except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action, as was suggested in *Andrew vs. Raeburn*, 9 L. R. Ch. D. 522, or in those cases where the practice of the old ecclesiastical Courts in this respect is continued." In *Andrew vs. Raeburn* the rule had been laid down that it was contrary to the practice of the Court to hear causes in private without the consent of both parties, except in cases which affect lunatics and wards of Court. As a general rule, subject, however, to certain necessary limitations, laid down in *Garnett vs. Ferrand*, 6 B. & C. 628, a Court of Justice should be open to the public, "and any person whatsoever, whether interested or not by reason of inhabitancy or otherwise, is entitled to enter, if

there is room for him to be there." . . . "This right has never been questioned. Nevertheless it is not an absolute right for any person to go and insist on choosing his own position." This is a matter for the presiding Judge, who has "the power of admission or exclusion according to his own discretion," though this power should not be exercised arbitrarily, and without considering the interests of justice. In the case before me, as I am not sure that by his exclusion from the hearing of the other cases the applicant sustained any real and substantial injury, or was prejudiced to any appreciable extent, I do not rely much upon it for setting aside the alleged valuation by the Town Council.

1884.
 March 12.
 „ 13.
 „ 31.
 —
 London and
 South African
 Exploration
 Co., Limited, *vs.*
 Kimberley
 Town Council.

LAURENCE, J. :—From the affidavits in this case it appears that certain immovable property belonging to the applicant Company, and situated within the municipality of Kimberley, has been valued for rating purposes on behalf of the municipality, under Ord. 17 of 1879, Griqualand West, at the sum of £633,500. At a Court held by the respondents on February 22nd and subsequent days, under section 73 of the Ordinance, for the purpose of hearing objections to the valuation, certain objections to the valuation of this property—which is described by the applicants as "waste lands" and by the respondents as "unoccupied stands"—were raised by the applicants, who had previously handed in a formal protest against the whole proceedings, on the grounds *inter alia* that they were irregular and *ultra vires*, which protest was received and overruled. The representative of the Company was then examined on oath in support of his objection; the evidence of other persons connected with the Company was also taken; the attorney of the Company addressed the Court: and then, as stated by Mr. Wolf, the chairman of the Court, "the Court attached all due weight to such evidence, and after consideration came to the conclusion that the valuation of £633,500 was too high, and lowered the valuation to £500,000, which the Court considers a just, fair, and reasonable valuation." The precise grounds on which this reduction was made, or the basis on which the sum of £500,000 was finally arrived at, are not stated by the respondents; and it appears to me that they were under no

1884.
 March 12.
 " 13.
 " 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

obligation to state them, and that these are matters upon which this Court, by section 74 of the Ordinance, is precluded from entering. Section 74 lays down that "The decision of the Council upon any objection to any valuation shall be final and conclusive, and shall not be capable of being reviewed or reversed by any Court or proceeding whatever." Now this is not like a bye-law, which the Court would not uphold if shewn to be unreasonable; this is an enactment of the Legislature, with the reasonableness of which we have nothing to do. On that point I will only make this observation—that the wisdom of the Legislature of the Cape Colony, not only previous to this local enactment, as already mentioned by the Judge President, but on at least two occasions since this Ordinance was passed in 1879, arrived at a different conclusion to that which then approved itself to the wisdom of the Legislative Council of Griqualand West. I find that by section 124 of the Municipal Act, Act 45 of 1882, which is a statute *in pari materia*, provision is made for appeals from valuations to the "Resident Magistrate of the district in which such property shall be situated, and such Court shall inquire into such valuation, and the decision of such Court shall be final and conclusive; provided, however, that if any question of law shall arise as to the principle upon which any valuation has been or should be made, it shall be lawful for such Resident Magistrate, instead of himself deciding such question, at the request of the Council or party objecting, to record such question of law for decision by some superior Court, and such question shall be stated in the form of a special case, and may be argued before and determined by the Supreme Court, or by the Court of the Eastern Districts, or High Court of Griqualand, in case any such question shall arise within the limits of the jurisdiction of such last-mentioned Courts respectively;" and section 77 of the Kimberley Borough Act, Act 11 of 1883, incorporates this section of the general Municipal Act of 1882. At present, however, we have to follow the provisions of section 74 of the Ordinance of 1879, which clearly renders it impossible for us to review or reverse the decision of the respondents on the objection by the applicants raised before and determined by the Assess-

ment Court. In England it has been held in somewhat similar cases—*e.g.* in that of *R. vs. Jukes*, 8 T. R. 544, *per* Lord KENYON, C.J.—that a provision of the law that a decision of the Justices shall be “final” does not oust the jurisdiction of the superior Courts of Law, on the ground that the remedy by *certiorari* can only be taken away by express words: see also *Wilberforce on Statute Law*, 43. Here, however, the remedy which in our system is akin to that in England under a writ of *certiorari*—that, namely, of review by a superior Court—is taken away by express words, and there is therefore nothing in these decisions which can help the applicants. Again, the Charter of Justice, by clause 32, gives the Supreme Court “full power, jurisdiction, and authority to review the proceedings of all inferior Courts of Justice within the Colony, and if necessary to set aside or correct the same;” and anything in a Griqualand West Ordinance to the contrary could not affect or curtail the power and authority given to the superior Courts by the Charter of Justice, and, so far as it purported to do so, I take it, would be inoperative and void. The answer, however, on this point seems to be that an Assessment Court of the Kimberley Town Council cannot fall within the term “inferior Courts of Justice;” and therefore, on consideration, this provision also appears to be inapplicable to the present case. Is this then a case in which, according to the language of Mr. Justice STEPHEN in the recently decided case of *Bradlaugh vs. Gossett*, dealing with some of the proceedings of the House of Commons in the case of Mr. Bradlaugh, the member for Northampton, we must say that the proper way to put the maxim is not *ubi ius ibi remedium*, but *ubi nullum remedium ibi nullum ius*, and that the present is a case in which the applicants have no legal remedy, and therefore as against the respondents no *ius*, or legal right? I take it, however, to be clear that if a statute gives a body like the respondents certain powers, to exercise in their absolute discretion, they must fulfil all the conditions which may be precedent to their exercise; and that if those preliminary conditions are not complied with, the proceedings themselves are irregular and *ultra vires*, and it is within the power of this Court to declare them null and void, and to restrain the

1884.
March 12.
„ 13.
„ 31.

London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

1884.
 March 12.
 " 13.
 " 31.
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

parties, if need be, by the usual process from acting as if their statutory powers had been properly exercised, or from any proceeding based upon such assumption. For instance, the Ordinance provides by section 72 that when the valuation is completed an Assessment Roll embodying the same shall be compiled and shall be open for inspection in the office of the Town Clerk, and the Council shall by public notice announce the day, hour, and place at which it will hold a Court for the purpose of hearing and determining any objections which may be raised to the valuation, and this notice is to be published in one at least of the local newspapers fourteen days at least before the day appointed for the holding of the Court. Now suppose the valuation roll was not allowed to lie open for inspection, and the parties interested were not allowed to inspect the same and take extracts therefrom, as provided by the section, or suppose that no notice was published, or that it was published within fourteen days of the sitting of the Court, or in some vehicle of publicity other than one of the local newspapers—I apprehend that in any of these events the Court would be justified in disallowing the valuation, at all events if it were shewn that prejudice had resulted from the omission of the Council to comply with the requirements of the law, and that the power of the Court to make such an order would be in no way affected or ousted by the provisions of section 74. In the present case it is not alleged that any of the possible irregularities I have suggested actually occurred; but other alleged irregularities are brought to our notice by the affidavits, which it is contended are equally fatal to the legality of the proceedings of the Court. Among other things it is stated and admitted that the Court sat with closed doors. This proceeding was apparently without precedent on the part of this Court, and it was certainly in my opinion objectionable and irregular, and the explanations of this course furnished by the affidavit of Mr. Wolf appear to me entirely inadequate and unsatisfactory. I agree substantially with the observations of my Lord on this point. I am bound, however, to add that I should not feel justified in setting aside the proceedings on this ground alone, in the absence of any proof that prejudice has been caused by the exclusion of the

public from the proceedings of the Court. I cannot find any precedent for such a ruling. Even where the proceedings of the Court are required by law to be carried on "in open Court, and not otherwise," as is provided in respect to our own superior courts by section 32 of the Charter of Justice, it would seem from the decisions that a discretionary power of excluding the general body of the public, as well as that of regulating their admission, is vested in the presiding Judge, and that if this discretion is wrongly exercised the individual excluded has no remedy. Passing with these remarks from this ground of objection to the proceedings now impugned, I will simply observe, as to the allegations that the valuation of the applicants' property was arrived at "*mala fide*, and in collusion with the members of the Council or some of them," that in my opinion, although the proceedings of the respondents are in some respects open to grave suspicion, this allegation has not been clearly proved, and in the absence of such clear proof cannot be acted on by the Court. Two only of the grounds on which this application is based remain to be considered. (1) The allegation that the Council has failed to comply with the requirements of section 71, in that Mr. Peters, who valued this property for them "was not a competent appraiser." (2) "That the valuation made by Peters and the amount fixed by the Court were arbitrary, vague, and fanciful, and not according to reason and justice." It is clear from the Ordinance that before the Council can deal with the matter at all there must be a valuation, and it must be made by a competent appraiser; if these conditions are not performed, the case is the same as if there had been such a non-compliance with the other requisites of section 72 as I have already hypothetically suggested. Whether Mr. Peters is or is not a competent appraiser appears to be a matter in issue between the parties, and on which the Court is bound, however reluctant it may be to do so, to express an opinion on the facts in evidence. Now it appears to me that the competency of Mr. Peters may be tested, so to speak, by both the *à priori* and the *à posteriori* method. According to Mr. Mitchell, he is a draper; according to Mr. Goodehild, he is a Kafir-store-keeper; but Mr. Peters himself says that these are the

1884.
March 12.
" 13.
" 31.

London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

1884.
 March 12.
 " 13.
 " 31.

 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

dyslogistic phrases of disappointed competitors for the proud position of valuator to the municipality, and that his real calling is that of a wholesale importer of general merchandise, and a sworn appraiser to the Master of the High Court. Now whether he sells general merchandise, drapery, or what is called "Kafir truck," it is probable that the services of Mr. Peters may often prove useful to the Master, as articles of these various descriptions often require to be appraised in insolvent estates and otherwise; but it by no means follows that he would prove a competent appraiser of immovable property, whether it be called waste lands or unoccupied stands, such as is the subject of the present proceedings. Having then no clear *à priori* proof of the qualifications and competency of Peters, let us come to what seems to me the real kernel of the whole matter, and test his capacity by his conduct. The first thing, of course, for a competent appraiser to do in a case of this kind is to obtain a proper basis for his assessment; and what the proper basis ought to be was a point on which I think Mr. Peters should have found no great difficulty in deciding. It was in fact laid down for him by Act of Parliament; not indeed by an Act actually binding on a valuator at Kimberley, but by an Act by which, its operation being *in pari materia*, he might perfectly safely and properly be guided. The Municipal Act, 1882, provides by section 119 that every valuer shall before entering upon the valuation entrusted to him make a solemn declaration to the effect that he will "truly and impartially appraise and value all such property as he shall be required to value in the municipality of —, for the purpose of assessment, and that he will conscientiously value the same at the full and fair price which such property would, in his judgment, be likely to realise if brought at the time of valuation to voluntary sale, and sold upon the usual terms and conditions." Now it is not contended that Mr. Peters has attempted to act on the just and reasonable basis which is here laid down; he has chosen, for reasons best known to himself, to decide that property within the limits of the municipality of Kimberley must be valued on a totally different principle to property within the limits of every municipality in the Colony which falls under the scope of

the general Act. Then, disregarding as he did this basis, and making apparently no attempt whatever to ascertain the selling value of this land *taken as a whole*, but confining himself to inquiries as to the selling value of particular portions of it, taken in small parcels, Mr. Peters, in order to assist his judgment, might have ascertained what the amount of the valuation had been in former years; he would then have ascertained that it had been valued for municipal purposes in the years 1880 and 1881 at £40,000; that in 1882 a valuation had been made at £50,000, but had been reduced to £40,000 on objection by the applicants; and that in 1883 the figure of £40,000 had again been arrived at. Had he taken this course, I think he would have felt some difficulty in arriving at the conclusion that, while other property within the municipality had within the last year admittedly decreased in value, the value of this land had in the same period suddenly multiplied sixteen-fold—from £40,000 to £633,500. Or, instead of adopting this system, there was a third course open to him; he might have adopted the system in force in England in valuing property for the poor-rate and similar purposes; he might have ascertained the annual rental which in his opinion was obtainable, taking into consideration all improvements and any other circumstances which might increase or depreciate the rental value, and by capitalising this amount he might have arrived at his valuation. Or again, he might possibly have taken the Divisional Council valuation of the applicants' property for the purposes of comparison, and so ascertained the proportional value of such portions of the property as are situate within the municipal limits. By adopting either of these latter bases it seems that the amount he would have arrived at would have been insignificant, not exceeding four figures; far less than the amount of the former valuations, and the amount which would probably have been obtained if he had adopted the basis laid down by the Municipal Act of 1882, and which it seems to me it would have been clearly the best and safest course for him to follow. Mr. Peters, however, has discarded all these methods and has hit upon a new, original, and startling plan. He has, as clearly appears from paragraphs 7 and 8 of his own affidavit, proceeded on

1884.
March 12.
" 13.
" 31.

London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

1884.
 March 12.
 „ 13.
 „ 31.
 —
 London and
 South African
 Exploration
 Co., Limited, vs.
 Kimberley
 Town Council.

the assumption that all the waste lands of the applicants, now used mainly, as it appears, for grazing purposes, can be utilised as building sites, and that the Company have only to put their lands in the market for that purpose in order that there may spring up on the Diamond Fields, as if by magic, a great city, with a population such as has never yet been accumulated in any part of South Africa. The population of the Fields is said to be at present about 20,000, and not to be increasing; but Mr. Peters's assessment assumes that some 20,000 building sites could be put on the market and sold to be used as 20,000 stands for the accommodation of, taking the moderate estimate of five persons to each house, an additional population of 100,000 souls. The theory of Mr. Peters is magnificent, and his imagination may well be called stupendous; but I cannot discover the foundation of fact on which this fabric of fancy has been built up. Mr. Rothschild and Mr. Goodchild, whose opinion on the subject is valuable, say in effect that the scheme and theory of Mr. Peters is simply ridiculous, and neither Mr. Peters nor the respondents have been able to obtain any evidence to contradict this opinion, which I think any unprejudiced person, with ordinary common sense, must accept as correct. It is true that Mr. Peters says that in one particular case Mr. Kilgour, the Company's agent, claimed £3000 for certain unoccupied stands on the outskirts of the town. As far as I remember, in that case, although the sum of £3000 was claimed, only £25 was awarded by the Court; and in other cases Mr. Kilgour may have chosen to put a fancy or prohibitive price on particular stands when required for purposes which he regarded as objectionable. The obvious answer to these allegations is that it cannot seriously be contended that because a stand here or half-a-dozen stands there are worth so much, therefore all the waste lands all round the town, for which there is no demand whatever, can be sold as building sites at similar rates. The assumption is so monstrous that it merely requires stating to demonstrate its absurdity; and yet that is the assumption on which Mr. Peters has thought fit to act. What is the result? In the first place he has proved by his conduct that, for the purposes for which he was appointed, he is an utterly in-

competent appraiser; in the second place he has made no valuation at all. A valuation is a calculation of value, and must be based on some intelligible and reasonable principle; otherwise it is a mere arbitrary estimate and not a valuation at all. That, in my opinion, is what we have before us; and such an estimate is not a valuation; it is not an assessment on which the respondents have any right to act. There is no need to object to it in detail; it must be set aside altogether. Before the Council can sit to hear and determine objections to the valuation, they must have a valuation, in the proper sense of the word, before them, upon which to act; and as this was not obtained, and yet the respondents have acted as if it had been obtained, the applicants are entitled to come to this Court for relief, and the order applied for must be made.

Order granted accordingly, setting aside the assessment, with costs.

[Applicant's Attorneys, STOW & CALDECOTT.
Respondent's Attorneys, CORYNDON & CALDECOTT.]

1884.
March 12.
" 13.
" 31.
—
London and
South African
Exploration
Co., Limited, vs.
Kimberley
Town Council.

QUEEN vs. JOHANNES.

*Form of criminal charges in Magistrates' Courts.—Act 17,
1867.—56th and 57th Rules of Court.*

Where a prisoner was charged before a Magistrate "under ordinary jurisdiction" with "the crime of theft, in that he stole one horse," &c., and was sentenced under the extended jurisdiction conferred on the Magistrate by Act 17 of 1867: Held, on review (LAURENCE, J., dubitante), that the sentence must be upheld.

William Johannes was tried before the Resident Magistrate of Kimberley on a charge of "theft." The charge-sheet was marked "Ordinary Jurisdiction"; the evidence shewed that the prisoner had stolen a horse, and he was convicted and sentenced to twelve months imprisonment with hard labour. The case came before LAURENCE, J., for review and, the *Crown Prosecutor* having intimated that he

1884.
March 17.
—
Queen vs.
Johannes.

1884.
March 17.
—
Queen vs.
Johannes.

was prepared to support the sentence, it was now argued, at the request of the Judge, by *Bowles* on the part of the prisoner, on the question whether, the charge purporting to be under ordinary jurisdiction, it was competent for the Magistrate to pass a sentence exceeding such jurisdiction, under the provisions of Act 17 of 1867.

Bowles contended that, as in this case the Magistrate had proceeded under Act 17 of 1867, which gave extended jurisdiction in cases of cattle-theft, the Act conferring such jurisdiction on the Magistrate, or at any rate the crime of "theft of cattle," should have been specifically mentioned; otherwise the prisoner had no means of knowing that he was charged under this Act, and was liable to twelve months' imprisonment under its provisions. In the warrant in the present case the prisoner was merely charged with the crime of theft, and the charge-sheet, which was headed "Ordinary Jurisdiction," charged him only with the crime of theft in that he stole one horse, &c. He referred to the 56th Rule of Court, which provides that "the indictment shall aver that the defendant is guilty of some certain crime or offence . . . and where the crime or offence is alleged to have been committed with any circumstance of aggravation which alters the legal character and degree of the offence, such aggravation shall also be strictly and accurately set forth: and if such crime or offence has been created by any statute or ordinance, or has had any particular punishment, or form of trial, or limitation prescribed by any such statute or ordinance, the same shall be referred to in the said indictment." The same principle applied to the description of the charge in the inferior Courts. Moreover, sect. 7 of Act 17 of 1867 begins with the words, "When in the course of any trial *under this Act*," &c., shewing that in cases of cattle-theft the trial must purport to be held under the statute in order to enable a sentence in excess of the ordinary jurisdiction to be imposed. He also referred to two cases reported in the *Digest of Magistrates' Cases Reviewed in the Cape Law Journal*, part i. p. 45; that of *Queen vs. Hans*, per BARRY, J.P., where it was laid down that "a prisoner tried under Act 17 of 1867, on a charge of theft of stock, cannot in the same indictment be tried by the Magistrate

on a charge of theft of poultry ;” and *Queen vs. Santar*, where SHIPPARD, J., held that, “Where a Magistrate tries a charge under his ordinary jurisdiction, he cannot sentence a prisoner to a longer term of imprisonment than three months, even though there are previous convictions.” He submitted that the present case had been tried under ordinary jurisdiction, and the sentence was therefore *ultra vires*.

1884.
March 17.
Queen vs.
Johannes.

Hoskyns, C.P.:—The Magistrate was really proceeding under the powers conferred on him by Act 17 of 1867 ; the nature of the crime was sufficiently described as “theft, in that he stole one horse,” &c., and the prisoner was bound to know the law and the penalties to which he had made himself liable. The heading of the charge-sheet, “Ordinary Jurisdiction,” was a mere clerical error, which the prisoner would not see, and by which he could not be prejudiced.

BUCHANAN, J.P.:—There is no doubt that there was a clerical error in the form of the charge in this case, and these irregularities require to be carefully scrutinised. As, however, it was clearly set forth in the charge that the theft of which the prisoner was accused was the theft of a horse, I do not think any prejudice could possibly have been caused by the error, and the Magistrate was therefore justified in sentencing under the Act of 1867. It would certainly be better for the Act under which the Magistrate is proceeding to be mentioned in such cases, but the conclusion to which I have come is that there was nothing in the proceedings now under review inconsistent with real and substantial justice, and that the conviction and sentence must therefore be upheld.

JONES, J., concurred.

LAURENCE, J.:—I certainly entertain considerable doubt as to this case. In previous cases of trials for stock-theft which have come before me for review, I think I have invariably found the charge-sheet marked “Under Act 17 of 1867,” and the averment made that the prisoner was “charged (under the provisions of Act 17 of 1867) with theft of cattle,” or similar words ; and that clearly appears

1884.
March 17.
—
Queen vs.
Johannes.

to be the correct form of procedure. Besides the words in sect. 7 of that Act referred to by Mr. *Bowles*, I find that sect. 2, which creates the penalties, speaks of "all cases in which any person may be accused of the theft of any cattle, sheep, or goats." Then, if we turn to the 56th Rule of Court, it seems to be clear that the "circumstance of aggravation"—namely, in this case the nature of the property stolen—should be set forth in the charge itself, and not merely left to be inferred from the particulars; while the 57th Rule lays down that the indictment shall *then* proceed to set forth plainly and certainly the facts connected with the commission of the alleged crime, &c.; and thus it appears that a sufficiently specific statement under the 57th Rule, following the words "in that," would not cure a defect in the preceding description of the offence under Rule 56. No doubt it may be said that the same degree of precision cannot reasonably be demanded in the framing of charges in the inferior as is required in the framing of indictments in the superior Courts; still, any laxity or irregularity in this respect is a thing to be carefully watched and checked, as in many cases it might tend to cause serious prejudice to prisoners charged perhaps with statutory offences of the nature of which they may be practically ignorant. I find, however, that in a recent case—that of *Queen vs. Scholtz*, 2 *Juta*, 267—the CHIEF JUSTICE remarked, in a case which was quashed on appeal on a technical irregularity: "I am not prepared to say that, as a Judge reviewing this sentence, I should have felt bound to propose to my colleagues a reversal of the decision of the Court below; because a Judge in Chambers has only to decide whether the proceedings were in accordance with real and substantial justice. If a prisoner does not feel that an injustice has been done him by the strict rules of evidence not being complied with, and does not appeal, I am not sure that a Judge in Chambers is bound to bring the case before his colleagues." The principle thus indicated is one of which I think the application should be very guarded and restricted; for it is very difficult to draw the line between those irregularities in the proceedings of inferior Courts which may interfere with real and substantial justice being done, and those which cannot possibly be held to have

that effect. However, the present case is probably one to which this observation of the CHIEF JUSTICE may fairly and safely be deemed to apply, and upon that ground I do not feel at liberty to dissent from the opinion of my colleagues that the sentence should be upheld.

1884.
March 17.
—
Queen vs.
Johannes.

In re FELTHAM.

Insolvency.—Compulsory sequestration.—Partnership and private estate.

Where a partnership estate had been sequestrated on a creditor's petition, and another creditor subsequently applied for the sequestration of the estate of one of the partners, and no writ had been taken out against the private estate and there was no proof of any act of insolvency committed by the partner in his private capacity, the Court dismissed the petition.

This was an application for a provisional order for the compulsory sequestration of the estate of H. J. Feltham, on the petition of T. J. Ball, Manager of the Kimberley Branch of the Cape of Good Hope Bank, who stated that the estate of Gordon and Feltham, trading at Kimberley as Gordon & Co., was compulsorily sequestrated on February 15, 1884; that the Bank was a creditor of the firm for over £20,000, and that the estate of the firm was not sufficient to pay its debts; "that the individual partners of the said firm are possessed of property belonging to their private estates, and that the said H. J. Feltham is possessed of property of considerable value, though not enough to satisfy all the claims against the said partnership; that it is very desirable for the protection of the interests of creditors that the private estate of the said Feltham should be placed under sequestration, &c."

1884.
March 17.
—
In re Feltham.

Lacey, in support of the application, relied on the order made by DWYER, J., in Chambers, in *Re Benjamin*, Buch. 1875, 117, where, on a partnership estate being surrendered,

1884.
March 17.
In re Feltham.

and it being represented that the private estate of one of the partners contained property of considerable value, though not sufficient to satisfy all the claims against the partnership, an order for the sequestration of the private estate was made; although that order was subsequently set aside by the Court, on the ground that there was no summons to shew cause, he submitted that it supplied a precedent for a provisional order being granted in the circumstances set forth in the present petition. But

The COURT held that, the case referred to having been decided on another point, the order made in Chambers could not be regarded as a precedent. In the present case the estate of Gordon & Co. had been sequestered on the petition of a creditor other than the applicant; no writ had been taken out against the private estate of Feltham; and the mere allegation of the applicant was not sufficient evidence of the insolvency of that estate to justify the Court in granting the order applied for. The petition was therefore dismissed.

The estate was subsequently sequestered on a fresh petition, setting forth additional facts in support of the application.

[Applicant's Attorneys, GRAHAM & GILBERT.]

PICKERING vs. KIMBERLEY TOWN COUNCIL.

Ordinance 17, 1879, G.W.—Municipal bye-laws.—Ultra vires.

The Kimberley Municipality, acting under the provisions of a local Ordinance, framed a bye-law, which was duly promulgated, requiring the licensing of vehicles, not plied for hire, whose owners resided within the municipality; the Ordinance provided for the licensing of vehicles plied for hire, and also empowered the municipality to make regulations for the suppression of nuisances and all such purposes

as might appear to be advantageous and convenient for the municipality. P., as the accredited agent of a Mining Company owning vehicles not plied for hire, for which no licence had been taken out, was convicted of contravening the above bye-law : Held, on appeal, that the bye-law was ultra vires and the conviction must be quashed.

This was an appeal from the Police Magistrate of Kimberley, before whom, on February 29, N. E. Pickering was charged, on the prosecution of the Kimberley Municipality, with contravening sect. ix. of the municipal bye-laws, in that "on or about February 20, the said Pickering, being the owner or accredited agent for owner, or being interested in the possession of a certain Scotch cart or carts of the De Beer's Mining Company, did wrongfully and unlawfully fail and neglect to take out licence for the same as by law required." The bye-law in question, which had been promulgated under the provisions of the Kimberley Municipality Amendment Ordinance, 1879, provided that "every *bonâ fide* resident within the limits of the municipality who is the owner, or who is entrusted with the possession of any cart, wagon, trolly, Cape cart, water-cart, carriage or other vehicle used otherwise than for hire within the limits of the municipality, shall take out a licence for the same in terms of the tariff set forth below. Such licence or licences to expire at the end of each municipal year." The tariff fixed the licence for a cart at £1 10s. From the evidence it appeared that the accused was the accredited agent of the De Beer's Mining Company, who possessed a certain number of Scotch carts which were kept and used for the purposes of the Company and otherwise than for hire, within municipal limits, and for which no licence had been taken out. The accused was convicted and fined 10s., and against this conviction he appealed.

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

Leverj, for the appellant, said the main point was whether this bye-law, which was made under sect. 41 of Ord. 17 of 1879, was not *ultra vires*. That section only authorised the municipality to make regulations for the licensing of carts *plied for hire* within municipal limits. These carts

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

did not ply for hire at all; they were used in the mining area for mining purposes, and only entered the municipality on the way to and from the compound where they were kept. It was true the bye-law had been promulgated; but if it was *ultra vires* the Governor's proclamation went for nothing.

Forster, for the respondents, admitted that was so.

JONES, J., mentioned the case of *Barling vs. Capetown Town Council*, Buch. 1875, 101, where it was held that the taxing of dogs by a municipality was *intra vires*, as being a regulation for general utility.

Levey contended that there was no general power under sect. 41 to cover a regulation of this kind: *expressio unius est exclusio alterius*. Again, assuming the bye-law to be good, how was it shewn that the accused came within it? There was no evidence that he was a "*bonâ fide* resident" within municipal limits. It was true the Company's premises were there; but for an offence committed by the Company the trustees should be prosecuted.

Forster, contra, contended that if the Company committed an offence in the nature of a tort any one connected with it, whether as accredited agent, shareholder, or in any other capacity, could be prosecuted. It was clear that these carts used the roads and were housed within the municipality, where the Company had its office and stables, and the official residence of the accredited agent must be taken to be on the premises of the Company. As to the principal contention, he argued that the respondents had the power to make this bye-law under sect. 41. The municipality had power to make regulations for the licensing of carts, wagons, or other vehicles plied for hire within limits of the municipality; the words "plied for hire" should be understood as only referring to the "other vehicles," as it would be absurd to apply them to wagons, which did not "ply for hire" within the above limits. It was improbable that the Governor, who was advised by the *Attorney-General*, would have allowed this bye-law if it had been *ultra vires*. Section 41 gives power "to levy dues, as hereinafter provided"; and sect. 46 gives

leave "to frame from time to time all such municipal regulations as may be within the powers and authority herein given to the Council, and as may seem fit for the good rule and government of the municipality." In *Barling vs. Capetown Town Council*, the CHIEF JUSTICE said that to invalidate the regulation the appellant must shew clearly that it was inconsistent with some provision of the Act express or implied. This regulation, however, was quite consistent with sect. 46. He also referred to *Municipality of Grahamstown vs. Ford and Jeffreys*, 3 Menz. 506. The regulation was an equitable one, for otherwise people might plough up the roads without contributing to their repair; moreover the Council were empowered to impose tolls and erect toll-gates; and by sect. 10 of the bye-laws, if a person produced a licence for his private vehicle he need not pay toll. The difference between carts plied for hire and private vehicles was that the former paid a small licence and also tolls, while the latter paid a heavier licence and were exempt from tolls. On the authority of *Barling's* case dogs could certainly be taxed, though no mention of taxing dogs was made in the Act. [JONES, J.: Dogs if they multiplied might become a nuisance. LAURENCE, J.: Sect. 41 gives authority for killing dogs.] As an alternative argument, the respondents fall back on their power of granting licences and collecting dues.

Levey, in reply:—The contention of the respondents seems to be that several sections must be gone into in order to ascertain their powers. As to dogs, the meaning of the words in sect. 41 is merely that the municipality can suppress nuisances; can it be said that Scotch carts are a nuisance, to be classed with bad meat or homeless dogs? The general words of the section as to vehicles must be construed with reference to the special words which precede them, and as applying to matters *eiusdem generis* with those specifically mentioned. If the words as to measures of general utility covered such a regulation as the present, why did they insert a special provision as to carts plying for hire, which would in that case be superfluous? It was clear that the general words merely referred to nuisances, and that the only vehicles which could be taxed were those plied for hire. The cases cited did not really apply, as they were on the con-

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

1884.
 March 17.
 „ 31.
 —
 Pickering vs.
 Kimberley
 Town Council.

struction of different statutes; and the decision must depend on the wording of the Act in each case. In the case of *Button vs. East London Municipality*, 1 Juta, 384, the CHIEF JUSTICE said:—“The Commissioners are not entitled to sue for a penalty for contravention of the regulations, and where a doubt exists in a case of this kind, it is the practice of the Court to construe it in favour of the defendant.” If this is inconsistent with the doctrine in *Barling’s* case, it is a later case and must be taken to overrule it.

Cur. adv. vult.

Postea (March 31),—

BUCHANAN, J.P., said:—This is an appeal from a conviction of defendant by the Police Magistrate of Kimberley on the 29th February, 1884. Mr. N. E. Pickering, the accredited agent of the De Beer’s Mining Company, was charged with the contravention of clause 1, section ix., of the municipal bye-laws of Kimberley, “in that upon the 20th February, as the accredited agent for the owner, or being interested in the possession of a certain Scotch cart, or carts, of the De Beer’s Company, he failed and neglected to take out a licence for the same as by law required.” Mr. H. S. Caldecott, for the accused, excepted to the indictment, as it disclosed no offence, inasmuch as it did not allege that the Scotch carts in question “plied for hire” within the limits of the municipality—*vide* section 41, Ordinance 17 of 1879. That section is as follows in the parts material to this appeal, the section being a very long one, and containing a variety of other points:—“The Council shall have power to do the following acts . . . [here follows a large variety]; to grant permits and licences for any purposes to be defined by the municipal regulations of the municipality for the time being . . . and by municipal regulations to do any of the following acts, that is to say . . . [here follows a variety of provisions as to slaughtering, dogs, pigs, goats, fowls, &c.]; to prevent nuisances, and generally to devise and carry out such measures as shall appear to be for the advantage and convenience of the municipality.” Then

follows power and authority to do a number of other specific acts, and then "to make regulations for the licensing of carts, wagons, or other vehicles plied for hire within the limits of the municipality, to fix a tariff of charges which the owners or drivers of such vehicles so plied for hire may make within a radius of four miles." . . . Then follow other powers, and the section reads thus: "Provided further that no due or charge for any permit or licence, or any punishment or penalty, shall be imposed by reason of anything in this section contained unless the same shall have been imposed by such municipal regulation as hereinafter (in section 46) provided," *i.e.* by meeting of Councillors and in due form. Recurring to the proceedings in the Court below, the exception of the non-allegation of plying for hire was overruled, and, the plea being Not Guilty, evidence was led which shewed that in the compound of the De Beer's Mining Company were found 37 Scotch carts, none licensed. The compound was within the municipal limits. The Company's manager stated that these carts were solely used for mining purposes within the mining area. The carts in going and returning only pass over municipal grounds. The Police Magistrate inflicted a fine of 10s. The defendant appeals. The grounds stated in the written notice of appeal are that the clause under which the prisoner was charged did not apply, and is *ultra vires*, as the carts do not ply for hire within the municipality, but are used merely for mining purposes. The mining area is distinct from municipal area, and is subject to the jurisdiction of the Mining Board as distinguished from the municipality. The main contention of the appellant's counsel in this Court was that the bye-law is *ultra vires*, inasmuch as the statute delegates no power to the Corporation to license carts not plying for hire, but the opposite. The respondents' counsel relied particularly on two decisions of the Supreme Court: *The Municipality of Grahamstown vs. Ford and Jeffreys*, 3 Menz. 506 (A.D. 1844), and *Barling vs. Town Council of Capetown*, Buch. 1875. p. 101, in which the former case was relied on in the judgment, after being considered as of binding force. In the Grahams-town case the municipality imposed a tax on produce

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

imported, as to which the Ordinance was silent as respects special provision. The tax was imposed by a regulation under the Ordinance. That tax was upheld. In *Barling's* case the Capetown Council passed a municipal regulation imposing a tax on dogs kept within the municipality, although the Ordinance was silent as to dogs, but provided against nuisances (*et vide Button vs. East London Municipality*, 1 Juta, 384 (A.D. 1882), *G. T. Council vs. Brown and Wood*, Buch. E. D. Reports, 2, 4, 338 (A.D. 1882), and *Cradock Municipality vs. Du Plessis*, same vol. p. 407). The cases relied on by respondents' counsel at first sight "look the other way." But it will eventually be seen that they are really not authorities which would justify us in upholding this conviction, as the regulations in those cases are clearly distinguishable from that in this. In the Grahamstown case there was nothing inconsistent or repugnant to the objects of the Ordinance in making a tax on produce, providing for market dues being one of the first duties of the municipality. In the second case the Ordinance gave powers to abate nuisances, and dogs, under certain circumstances, are such. Whereas in the present case the Legislature had the licensing of carts specially under its consideration in section 41, and authorised a licence for those plying for hire. If it had wished to give powers to tax carts and carriages *not* plying for hire, here is the place we would have expected to find the provision. And to allow the Town Council by virtue of general words to frame this regulation would seem to me to be allowing an extension of power not contemplated by the Legislature, but the contrary. It is safer, therefore, on the sound doctrine that powers to tax assumed by Corporations should be clearly delegated by statute, to hold in this case that, all things considered, the regulation was *ultra vires*, and the conviction must be quashed. I admit I have arrived at this decision with a great deal of difficulty in the face of the Grahamstown and Capetown cases above cited, and had I not eventually recognised the distinctions that may well be drawn between these two cases, would have followed those cases, which are as yet of binding precedent, whatever doubts they may be open to. The conviction must be quashed and

with costs. For as the Ordinance (section 83) allowed the Court to award costs to the prosecutor had he succeeded here, so it is competent to give costs against him when he fails.

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

JONES, J., said:—Pickering was charged in the Court of the Police Magistrate for the District of Kimberley with the crime of contravening clause 1 of section ix. of the municipal bye-laws, in that, being the owner or accredited agent for the owner, or being interested in the possession of a certain Scotch cart, he wrongfully and unlawfully failed and neglected to take out a licence for the same as by law required. The accused was found guilty, fined 10s., and against this judgment he now appeals to this Court. Two principal grounds for this appeal are laid before the Court, but I need only deal, for the purposes of my judgment, with one of them, viz., the contention of the appellant that the bye-law under which he has been found guilty is *ultra vires*, or, in other words, that no such regulation or rule could be made under the powers granted by the Kimberley Municipality Amendment Ordinance No. 17 of 1879. "A bye-law creating a forfeiture made by a Corporation without express power to do so having been given by Act of Parliament is bad" (*Kirk vs. Nowill*, 1 T. R. 124). Whenever a person is charged with the commission of a criminal offence this Court must inquire strictly whether the act complained of is a crime in law. The Legislature may delegate some of its powers to municipal corporations by enabling them to make bye-laws and thereby create penalties; but in every case it appears to me that the Court must examine carefully the powers delegated. "*In iurisdictione delegata quidquid specialiter non est delegatum pertinet ad iurisdictionem ordinariam*," the maxim of Bynkershoek cited with approval by Judge SMITH in delivering the judgment of the Eastern Districts Court in the case of the *Craddock Municipal Commissioners vs. Du Plessis*, 2 Buch. E. D. C. 409. The case of the *Municipality of Grahamstown vs. Ford and Jeffreys*, 3 Menz. 506, is relied on by the respondents; but that was a case decided upon some very general words in another Ordinance. By the 7th section of Ordinance 9 of 1836, under which the regulations of the Grahamstown

1884.
 March 17.
 " 31.
 Pickering vs.
 Kimberley
 Town Council.

Council were framed, power was given to frame regulations, "to fix the limits of the municipality," "to fix the number of Commissioners and Wardmasters, to make rules for the classification and valuation of immovable property within the municipality, and to frame regulations which *shall be necessary to enable the said Commissioners to carry into effect the provisions of this Ordinance*, or such of them as the Committee shall think expedient and necessary for the municipality." Under the 11th section the further proviso is introduced that nothing in "*any of the Municipal Regulations contained shall be repugnant to or inconsistent with the true intent and meaning of the provisions of this Ordinance.*" Referring to the preamble of the same Ordinance, we find that the object of the enactment was the general one that "due provision should be made for the better regulation of certain matters and things of a local nature within the districts, towns, and villages of this Colony, and that Municipal Boards should be appointed." Under these exceedingly wide and general words the Supreme Court, in 1844, held a bye-law valid which imposed a charge of $\frac{1}{2}$ per cent. *ad valorem* upon all colonial produce or manufacture of the tribes beyond the boundaries of the Colony, sold or bartered within the municipality of Grahamstown, but not sold in the public market. Doubts have been expressed as to the correctness of this judgment; but it still remains. With reference to it I need only say that the Kimberley Ordinance is not couched in the wide and unlimited terms of the General Municipal Ordinance of 1836. *Barling vs. The Town Council of Capetown*, Buch. 1875, p. 103, carries us no further. Sir J. H. DE VILLIERS, C.J., though unable to distinguish this case from that of the *Municipality of Grahamstown vs. Ford and Jeffreys*, says distinctly that there appeared to him to be force in the argument of the appellant's counsel, that inasmuch as "certain specific modes of obtaining revenue by means of rates upon immovable property are pointed out by the Act, no other mode can be established by any regulation, on the principle of the maxim *expressio unius est exclusio alterius*, and if this question had been *res integra* he should have entertained grave doubts as to whether this objection might not

be held fatal to the validity of the regulation." Between that case and the present a distinction can be drawn. The Capetown Municipality had made a regulation requiring all owners of dogs "kept within the limits of the municipality to apply for and obtain from the secretary of the Town Council a register and number on a brass plate for every such dog, and pay the sum of 5s. for every number and register." "Now, although," says the CHIEF JUSTICE, "it is quite true that the mere keeping of one or more dogs does not *per se* constitute a nuisance, it is clear that the keeping of an unlimited number of dogs by the inhabitants, and the prowling about of numerous ownerless dogs might, unless prevented by timely municipal legislation, become a positive nuisance. Any regulation therefore which, like the present, distinctly tends to check the number of dogs so kept, and to prevent the prowling about of dogs having no owner, must be deemed to be a regulation framed for a purpose of general utility within the municipality." For the purpose of deciding that case it would have been sufficient to say that the regulation in question was made for the purpose of abating a nuisance. Judge DENYSSEN, in delivering judgment in the same case, points out that the Legislature had affirmed that the keeping of dogs might be a nuisance by passing Ordinance 16 of 1836, "for abating the nuisance occasioned by dogs running at large in and about Capetown." Such a contention could not be admitted in the case before us. Much stress has been laid upon the remark of the CHIEF JUSTICE that "the utility of the regulation becomes still more apparent when it is borne in mind that the regulation provides an important item of revenue towards defraying the municipal expenditure." The remark itself was not necessary for the decision of the case, nor do I think that it was intended to lay down the rule that the imposition of every tax the Council might invent, which was productive of an important source of revenue, would be *intra vires*. Such a doctrine could hardly be deduced from the words used. In the case of *Button vs. East London Municipality* no such doctrine is laid down. The powers conferred upon the Kimberley Municipality are not of the same general character. By section 41 of Act 17 of 1879, among other things

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

1884.
 March 17.
 " 31.
 —
 Pickering vs.
 Kimberley
 Town Council.

they are empowered to "grant permits and licences for any purpose to be defined by the municipal regulations of the municipality for the time being, to levy dues as provided in the subsequent sections of the Ordinance; and by municipal regulations duly approved to do any of the following acts—that is to say, to regulate the time and place of slaughtering cattle, &c., &c.; to prevent and abate nuisances, and generally to devise and carry out all such measures as shall appear for the advantage and convenience of the municipality, &c., &c.; to make regulations for the licensing of carts, wagons, or other vehicles plied for hire within the limits of the municipality, to fix a tariff of charges which the owners or drivers of such vehicles so plied may make within a radius of four miles from the centre of the Market Square," &c. The Legislature has taken care specifically to state the powers and authority to be exercised, and has in words empowered the Council to make regulations for licensing vehicles *plied for hire*. For the purpose of providing funds for the construction, maintenance, and repair of the roads, streets, and thoroughfares within the municipality, the Council is authorised "to erect turnpikes, toll-gates, or toll-bars" (section 43), and, with the consent of the Governor and Executive Council, to fix rates of such tolls (section 43). "For the purpose of raising means for making and repairing roads, streets," &c., &c.; "for the payment of salaries and all other current expenses required to be borne by the municipality," the Council has power to "impose, levy, and recover all such *market dues, water-rates, and pound-fees* as shall be deemed necessary and reasonable, and shall be authorised by any such municipal regulations as aforesaid;" and they also have the power "to assess the value of all immovable property within the municipality, and levy a rate on such assessment" (section 49). The Council are thus specially authorised to levy market-rates, dues, water-rates, pound-fees, rates on immovable property, levy tolls, and charge for licensing carriages *plied for hire*, but no power is given to tax the owners of other vehicles. When the Legislature is thus careful to state the powers conferred with precision, we cannot hold that it is intended to delegate powers of an entirely different description: *expressum facit*

cessare tacitum. Under the bye-law under consideration every dealer in carriages or carts, who possesses carts and happens to live in the municipality, must pay this tax. If a tax of this kind is within the powers of the municipality, I see no reason why a tax should not be imposed upon each particular kind of movable property which a resident may own, possess, or be entrusted with. I therefore concur in thinking that the appeal must be allowed.

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

LAURENCE, J.:—This is an appeal from a judgment of the Police Magistrate of Kimberley, before whom, on February 29th last, the appellant was charged with the crime of contravening, on February 20th, section 9 of the Kimberley Municipal Bye-laws, in that he, "being the owner or accredited agent for the owner, or being interested in the possession of a certain Scotch cart or carts of the De Beer's Mining Company, did wrongfully and unlawfully fail and neglect to take out licence for the same, as by law required." The accused pleaded "Not Guilty;" evidence was taken, and he was convicted and sentenced to pay a fine of 10s. The section under which the appellant was convicted runs as follows:—"Carriage and cart licences: 1. Every *bonâ fide* resident within the limits of the municipality who is the owner, or who is entrusted with the possession of any cart, wagon, trolly, Cape cart, water-cart, carriage, or other vehicle used otherwise than for hire within the limits of the municipality, shall take out a licence for the same in terms of the tariff set forth below. Such licence or licences to expire at the end of each municipal year." Then follows the tariff of licences, varying according to the nature of the vehicle from £1 10s. for carts to £3 for trollies, wagons, and four-wheeled carriages. Section 12 of the same regulations provides that any person contravening any of the sections in which no penalty is especially mentioned, shall be liable to a fine not exceeding £10, or in default to imprisonment for any period not exceeding three months. These bye-laws have been proclaimed by the Colonial Secretary, by command of the Governor in Council, and they are contained in Proclamation 16 of 1883, published in the *Government Gazette* of February 9th, 1883. They purport to have been pro-

1884.
March 17.
" 31.

Pickering vs.
Kimberley
Town Council.

claimed "under and by virtue of the provisions of the Kimberley Municipality Amendment Ordinance, 1879." The sole question which the Court has to determine is whether the bye-law under which the appellant was convicted was properly proclaimed by the Governor in Council under the provisions of the Ordinance of 1879; whether, in short, there is anything in that Ordinance justifying the respondents in framing and the Governor in Council in approving the bye-law in question, or whether the proceedings of both the respondents and the executive have been *ultra vires* and illegal. In the former case, the appeal must be dismissed; in the latter, the conviction must be quashed. Although the penalty actually imposed in the present case is insignificant, the questions involved—both as to the principles to be applied in dealing with the matter and the practical effect of their application—are of much importance, and the decision of this appeal has required very long and careful deliberation, and very frequent consultations between my colleagues and myself. Certain points were raised on behalf of the appellant besides the question I have indicated, viz., that there was no sufficient proof of his being what is rather curiously described in the section as a "*bonâ fide* resident," and that he, the accredited agent of the De Beer's Mining Company, was neither the owner nor interested in the possession of the Company's carts, and that the trustees, and not the accredited agent, were the proper persons to be prosecuted. I will merely say on these points that I do not think there is anything in them, and that I am of opinion that the alleged illegality of the section under which he was convicted is the only substantial point raised for the decision of the Court. I would also say at once that, whatever the decision of the Court on this point be, I think the Police Magistrate was in one sense quite justified in convicting; for, on the analogy of the decision of the Supreme Court in the case of *Municipality of Capetown vs. Morkel and De Villiers* (3 Menz. 561), it was scarcely for the Police Magistrate to decide that the action of the Governor in Council had been *ultra vires*. We know that a Police Magistrate recently took upon himself to annex the largest island in the world; but Police Magistrates in this Colony are not so

ambitious in their views as the Police Magistrate in Queensland, whose action indeed failed to commend itself to the Secretary of State. Moreover, whatever view may be ultimately taken, there can be no doubt that there is a considerable body of authority, to which the attention of the Magistrate may or may not have been directed by Mr. Denis Doyle, who prosecuted on behalf of the Town Council, and which might be cited with considerable force in favour of the legality of the regulation now under challenge; I refer especially to the cases of *The Municipality of Grahamstown vs. Ford and Jeffreys* (3 Menz. 506), and *Barling vs. Town Council of Capetown* (Buch. 1875, 101), which I shall presently consider. The general question as to the power of municipal bodies to make bye-laws, and thereby constitute offences, under the Act or Ordinance, whether general or special, under which they are incorporated, or by which their powers are defined, and the limitations of that power, is very fully and learnedly discussed by Mr. Justice SMITH in the case of the *Cradock Municipal Commissioners vs. Du Plessis*, reported in 2 Buch. E. D. C. 407, in which case it was held that "a municipal regulation, duly framed and confirmed by the Governor, rendering any person liable to a criminal prosecution who shall expose for sale on the market any article according to a sample or a specified description, which article shall not be in accordance with the sample or description," was *ultra vires* on the part of the Cradock Municipal Commissioners, and a conviction thereunder was accordingly quashed. The following citations by Mr. Justice SMITH seem worth quoting in the present case:—"Every bye-law must be *legi, fidei, rationi consona* . . . a bye-law not reasonable in any respect will be void" (Comyns' Dig. "*Bye-law*," b. 1, c. 6). "Every charge levied upon the people without the assent of Parliament will be void" (Comyns' Dig. c. 5, d. 2, Co. Inst. 60, 61). Further, bye-laws must be such as are within the scope of the authority of the body making them, otherwise such corporate body has no power to make them, although they are conformable to the general law of the land. "The only question in this case," says Baron ALDERSON, delivering judgment in *Calder and Hebble Navigation Company vs. Pilling* (11 M. & W.

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

1884.
March 17.
" 31.

Pickering vs.
Kimberley
Town Council.

87), "is whether the bye-law be good or not. For the purpose of determining that, we must look to the powers to make bye-laws given by the Legislature to this company, in order to see whether this bye-law is within the scope of their authority, or whether it does not relate to matter which ought to be left to the general law of the land by which the general conduct of the Queen's subjects is regulated." This rule is included in the general principle laid down by Bynkershoek (*Questiones Iuris Publici*, i. 18, *sub fine*), where he says "*In iurisdictione delegata quicquid specialiter non est delegatum pertinet ad iurisdictionem ordinariam.*" Now let us see what power of legislating has been specially delegated to the Town Council of Kimberley. By section 41 of the Ordinance of 1879 (which in all respects material for the purposes of the present case, with one or two exceptions, which I will presently point out, closely corresponds to the new Kimberley Borough Act, 11 of 1883, not yet proclaimed) the Council has power and authority *inter alia* "to grant permits and licences for any purpose to be defined by the municipal regulations of the municipality for the time being, to levy dues, as hereinafter provided [before 'to levy dues' there is merely a comma instead of a semicolon, which is necessary for the sense, a printer's error which led counsel for the appellant to suggest the quite unreasonable and inadmissible construction that the meaning was that the municipality might grant permits and licences to certain persons to levy dues, and that thus there might be a further delegation of the power of taxation; in the new Act it will be observed that the punctuation is correct, and in accordance with the clear meaning of the clause as shewn by the context]; and by municipal regulations duly approved to do any of the following acts, that is to say, to regulate the time and place of slaughtering cattle, and the state and condition of slaughter-houses and slaughter-places, to make due provision for the confining or killing of dogs, pigs, goats, and fowls [the new Act runs 'to make due provision for the licensing, confining, or killing of dogs, the confining or killing of pigs, goats, and fowls,' implying at all events that the draftsman considered it at least doubtful whether there was any power of licensing dogs under the

clause in the present Ordinance], to appoint one or more competent persons to examine meat, fish, and other provisions exposed for sale, and test or analyse any drinks offered for sale, and who in case such meat, fish, or other provisions and beverages be unfit for human food or drink, shall be empowered to cause the same to be destroyed, to prevent and abate nuisances, and *generally to devise and carry out all such measures as shall appear to be for the advantage and convenience of the municipality* to make regulations for the licensing of carts, wagons, or other vehicles, plied for hire within the limits of the municipality, to fix a tariff of charges which the owners or drivers of such vehicles so plied may make provided further, that no due or charge for any permit or licence, or any punishment or penalty shall be imposed by reason of anything in this section contained, unless the same shall have been imposed by some such municipal regulations as hereinafter (section 46) provided." Section 46 merely provides "That it shall be lawful for the Council at any meeting at which two-thirds of the members shall be present, to frame from time to time all such municipal regulations as may be within the power and authority herein given to the Council, and as may seem fit for the good rule and government of the municipality." We are thus referred back to section 41 to ascertain what regulations are "within the power and authority herein given to the Council;" for the section cannot be construed as meaning to give the Council power to make any regulations that "may seem fit for the good rule and government of the municipality," unless such regulations are also "within the power and authority" given to the Council by the Legislature. Section 47 goes on to provide that "no municipal regulation shall be of force to subject any person to a fine, penalty, or a payment, until it shall have been by the Council submitted to the Governor or Administrator, and shall have been approved of by him with the advice of the Executive Council and published in the *Government Gazette*." Turning back then to section 41 we find the Council empowered, in the first place, "to grant permits and licences for any purpose to be defined by the municipal regulations for the time being, and to levy dues as hereinafter provided," and

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

1884.
 March 17.
 „ 31.
 Pickering vs.
 Kimberley
 Town Council.

thus we have to go further to see for what purposes municipal regulations may be made and dues levied. Then next to this clause comes the definition of the purposes for which municipal regulations may be framed, and the first consists of sanitary measures and measures for the prevention and abatement of certain nuisances, followed by the general words “and generally to devise and carry out all such measures as shall appear to be for the advantage and convenience of the municipality.” There can be no doubt that these words must be construed as *in eiusdem generis* as the matter previously specifically referred to, and the construction of such general words by the Courts has usually been extremely strict. For instance, in England, the Q. B. Division, presided over by Lord COLERIDGE, was occupied the other day with a very long and elaborate argument in the case of *The Metropolitan Board of Works vs. Eaton and Another*, scavengers of the Commissioners of Sewers, which turned upon the construction of 18 & 19 Vict. c. 120, which provides that “No scavengers shall sweep any soil, rubbish or filth, or any other thing, into any sewer or drain;” and the question the Court had to determine was whether the words “or any other thing,” after the words “soil, rubbish, or filth,” ought to be construed as including mud. It seems to me clear that these general words cannot be construed as indirectly giving the Council a power of taxing property generally, whether movable or immovable, so long as it happens to be within the municipal limits—a power that is, which, unless expressly delegated, has always been held to be inherent in the Parliament alone, by whom alone the subject can be taxed. The general words, construed with reference to the particular words which precede them, must certainly refer exclusively to measures for the abatement of nuisances or for purposes *eiusdem generis*; and if the Council could tax Scotch carts, dog-carts, or four-wheeled carriages, and vehicles of every other kind, as by this section they assume to do, on the pretext that they were nuisances, and in the same category as filthy slaughter-houses, diseased pork, stale fish, or adulterated cango, they might just as plausibly, on the same pretext, tax numbers of other things,—cats, for instance, or

pianos, or photograph albums, all of which might in certain circumstances be just as great nuisances as a barouche, a wagonette, or even a Scotch cart. In the Cradock case already cited, Mr. Justice SMITH referred to a case under section 90 of the English Municipal Corporation Act, which enacts "that it shall be lawful for the Council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force throughout such borough, and to appoint by bye-laws such fines as they shall deem necessary for the prevention and suppression of such offences, provided that no fine so appointed shall exceed the sum of £5." A Town Council made a bye-law under this section, imposing a fine upon every person "who shall keep or suffer to be kept any swine within the borough from the 1st day of May to the 1st day of October inclusive in any year." The Court of Q. B. held that this was a bad bye-law (*Everett vs. Grapes*, 3 L. T. N. S. 609, Q. B.). "This case," as Mr. Justice SMITH observes, "shews that notwithstanding the very general words of the section delegating the powers, viz., to make such bye-laws as to them shall seem fit for the suppression of nuisances; yet a Town Council has not an arbitrary discretion to prohibit any one from committing an act that may or may not be a nuisance, according to circumstances." Similarly in another case, where a Local Board was empowered to make bye-laws relating to such matters as the width of streets, drainage, walls, and to pull down any houses built in contravention of the bye-laws, it was held that the Act did not authorise the Board to make a bye-law to the effect that any building of which they disapproved might be pulled down; *Brown vs. Local Board of Holyhead*, 1 H. & C. 601. Other cases illustrating the strictness with which, when a power to make bye-laws is conferred by statute, the authority of the statute must be followed, will be found in *Wilberforce on Statute Law*, 61-62. If further demonstration were required of the proposition that these general words cannot be construed, having due regard to the context in which they occur, as including among the measures "for the ad-

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

1884.
 March 17.
 " 31.
 Pickering vs.
 Kimberley
 Town Council.

vantage and convenience of the municipality," which the Council have power to make, regulations to devise and carry out measures for the taxation, whether by means of licences or otherwise, of property situate within the municipal limits, it may be found in the following considerations. The powers of taxation conferred on the municipality by the Ordinance appear to be very clearly laid down, and their limitations very clearly defined. They may levy rates on immovable property, but by section 75 these rates must not in any one year amount in the aggregate to more than 3*d.* in the £1, unless with the express consent, first had and obtained, of a majority of the ratepayers. It is obvious that if the words under consideration gave a general power of raising money by means of licences on movable property, or even by means of licences on such kinds of movable property as might in certain circumstances amount to or be regarded as nuisances—for it cannot be contended that a four-wheeled carriage or a dog-cart is a nuisance *per se*—this provision of section 75 might be entirely evaded, and the municipality without the consent of the ratepayers might, in addition to the ordinary threepenny rate, raise by other means any income they liked for any purpose they thought "advantageous or convenient" to the municipality. As a matter of fact, however, the only other sources of municipal income besides rates which the Ordinance appears to contemplate are :—(1) Tolls, provisions as to which will be found in sections 42–45, the latter section expressly enacting that "a separate account shall be kept of all moneys arising from such tolls, and the same shall be applied solely for the purpose of constructing, maintaining, repairing, altering, and improving roads, streets, and thoroughfares within the municipality." (2) Dues, under section 69, by which the Council is empowered "to impose, levy, and recover all such market dues, water-rates, and pound-fees as shall be deemed necessary and reasonable," to be applied to purposes specially set forth in that section. Rates and dues under sections 69 and 75, and tolls under sections 42–45 seem to be the methods of raising revenue for municipal purposes contemplated by the Ordinance; and I am certainly of opinion that the clause in section 41 now under discussion does not furnish the municipality with any

other method or any additional instrument for attaining that end. The following are the only words in the section which still remain to be considered. It goes on to empower the Council "to make regulations for the licensing of carts, wagons, or other vehicles, *plied for hire* within the limits of the municipality, and to fix a tariff of charges which the owners or drivers of such vehicles *so plied* may make." Now these words seem to me to be in themselves decisive of the question before the Court. For either their object is to create an additional source of municipal revenue, or it is not. I am inclined to think that it is not; that the power given by this clause is not so much fiscal as administrative; that it is in fact a matter, not of revenue, but of police. The legislature considers it desirable that hackney carriages and other public vehicles plied for hire, and their owners and drivers, should be under municipal control and supervision, and that there should be a regulated tariff of charges for such conveyances. Provision is accordingly made for their licensing, in order to ensure their being under adequate control and to provide for the expenditure which such control must involve. If, therefore, this clause is not regarded as having been enacted for revenue purposes, the former argument on the subject remains unaffected; if on the contrary the object of the clause is substantially or even partially fiscal, then the maxim *expressio unius est exclusio alterius* must apply, and the Council having power expressly given them to licence vehicles *plied for hire* have impliedly no power given them to require licences to be taken out for, and to impose a tariff on, other vehicles not plied for hire, as this bye-law purports to do. I have certainly always understood that such a power as is here claimed—that of taxing private carriages and carts—if exercised at all is exercised by the Legislature, as a method of direct taxation and as affording a contribution to the public revenue of the State, and not delegated to municipal or other local bodies; and I can find nothing in the Ordinance before us to shew that we have here an exception to the general principle applicable to such matters. "Where a doubt exists in a case of this kind," the CHIEF JUSTICE remarked in the recent case of *Button vs. East London Municipality* (1 Juta, 386), "it is the practice

1884.
March 17.
" 31.

Pickering vs.
Kimberley
Town Council.

1884.
March 17.
" 31.
Pickering vs.
Kimberley
Town Council.

of the Court to construe it in favour of the defendant." I think I have said enough to shew that it is more than doubtful whether any such power as is assumed in the section of the Kimberley bye-laws now in question was ever conferred upon the respondents by the Municipal Ordinance of 1879. On these grounds I should have felt no hesitation in deciding that the section of the local bye-laws under which the present appellant was convicted was *ultra vires*, and that the conviction must therefore be quashed, were it not for the two decisions already referred to—*Municipality of Grahamstown vs. Ford and Jeffreys*, and *Barling vs. Town Council of Capetown*, which certainly appear to present considerable difficulty in the way of arriving at such a view. By the general Municipal Ordinance, No. 9 of 1836, sections 6 and 11, the Commissioners of Municipalities and committees of householders elected in the manner by the Ordinance prescribed were empowered "to frame such municipal regulations as they may deem expedient, &c. . . . provided that nothing in such regulations contained shall be repugnant to or inconsistent with the true intent and meaning of the provisions of this Ordinance." Under these sections certain municipal regulations were drawn up for Grahamstown, and approved by the Governor, as provided by the Ordinance, and the 35th section of these regulations was as follows:—"All colonial produce (wool alone excepted) and all articles of produce or manufacture of the tribes beyond the boundaries of the colony, and which shall be sold or bartered within the municipality of Grahamstown, but not sold on the public market, shall pay the usual fees of registry, and a percentage of half per cent. *ad valorem* shall be charged to the buyer and the seller, &c." This section, which established in effect a sort of *octroi* for produce brought into and sold by private contract within the municipal limits, was held by the Supreme Court (WILD, C.J., and MENZIES and MUSGRAVE, JJ.), in a considered judgment, reviewing a decision of the Resident Magistrate of Albany to the contrary, to be a good and valid regulation under the Ordinance. The Court held that the power of making regulations conferred on the Municipal Commissioners was general, and that any regulation made by them as being in their opinion expedient, and

approved by the Governor, was "valid, legal and effectual, provided it is not repugnant to or inconsistent with the true intent and meaning of the provisions of the Ordinance," and that section 35 contained nothing repugnant to or inconsistent with such provisions. The Court further held "that to raise a revenue on property, real or personal, situated within the municipality, for the purpose of defraying the expenditure for municipal purposes of a local nature, and for the benefit of the inhabitants of the municipality, is within the purposes and intent of the Ordinance; that the provisions of the 28th section of the Ordinance, respecting the assessment of rates on immovable property, has not the effect of restricting the municipality to that kind of assessment for raising the revenue, but is only directory that this assessment shall be made in a certain way, and for a certain time." It should, however, be observed that neither in the 28th section nor in any other section of the Ordinance of 1836 was there any provision limiting the amount of the rate, similar to that contained in section 75 of the Kimberley Ordinance. The Court also held "that it has never been doubted that a municipality may make regulations imposing market dues on articles sold on the market established by the municipality; yet it will be seen that the 38th section, which is commonly but erroneously supposed to give them the power of imposing such duties, gives them no such power; and that they possess it solely in respect of the provisions of the 6th and 11th sections. That regulations made for raising municipal revenue for purposes *bonâ fide* local and municipal by a toll on all articles which shall be brought into the municipality from any place without the same come strictly within the view and intent of the preamble of the Ordinance, and are therefore, when duly approved and published, legal and valid. That if the municipality possess, as it has now been shewn that it does, the power to make such a regulation as the last mentioned, *à fortiori* it must have power to make a regulation which, like the 35th section, impose a duty only on such produce as, having been brought into the municipality, shall be sold or bartered within the municipality, and not on the public market." Referring to this case, the present CHIEF

1884.
March 17.
" 31.

Pickering vs.
Kimberley
Town Council.

1884.
March 17.
„ 31.

Pickering vs.
Kimberley
Town Council.

JUSTICE said, in *Barling vs. The Town Council of Capetown*, (Buch. 1875, at p. 106): “Considering that the Judges who concurred in that decision were three of the most learned and eminent men that have occupied a seat on this Bench, considering that the decision has been acquiesced in for upwards of thirty years, and, above all, considering that the Legislature, to whom that decision must be presumed to have been known, did not insert any provision neutralising its effect into the Act No. 1 of 1861, or Act No. 1 of 1867, it would ill become this Court at the present time, however grave the doubt it might entertain, to over-rule that case.” And DENYSSEN, J., said: “Reference had been made to the decision of the Court in the *Grahamstown* case, affirming the right of the municipality to impose certain market dues. There is no doubt that this Court should uphold that decision.” After these remarks, it seems to me practically impossible for any Court in this Colony, except the Court of Appeal, to overrule the decision in *Grahamstown Municipality vs. Ford and Jeffreys*. It is, however, to be observed that the presumption alluded to by the CHIEF JUSTICE, that the Cape Legislature in passing the Acts of 1861 and 1867 was aware of the decision of the Supreme Court of that Colony in 1844, does not apply to the Legislative Council of Griqualand West, which, in passing the Ordinance of 1879, cannot be presumed to have been aware of the decision of the Courts of what was then another Colony. On the whole, moreover, it seems to me—though I have not arrived at this conclusion without considerable doubt—that the reasoning which led the Supreme Court in 1844 to affirm the validity of section 35 of the *Grahamstown* bye-laws does not apply to section ix. of the *Kimberley* bye-laws now before us. It was then held that, so far from the regulation in question being repugnant to or inconsistent with the true intent of the Ordinance, it was made for purposes clearly contemplated by the preamble, and that, unless a power of making regulations for levying market dues and analogous purposes, which it was clearly intended the Commissioners should have and exercise, was implicitly contained in the very general expressions of sections 6 and 11 of the Ordinance, no such power existed at

all, since the supposition that it was contained in the 38th section was erroneous, which indeed will at once appear on reference to that section. But in the local Ordinance before us very clear and express powers are given of levying market dues and tolls as well as rates, and therefore the maxim *expressum facit cessare tacitum* makes the powers conferred on the respondents by the local Ordinance clearly distinguishable from those conferred on the Grahamstown Commissioners by the general Ordinance of 1836. As to the later case of *Barling vs. Town Council of Capetown*, it was there held, though not without some expressions of doubt, that the power given to the Council, under the local Act of 1867, to make regulations for certain specified purposes, such as the prevention and abatement of public nuisances, and “for all and every other purpose of general utility within the municipality which shall appear to require such regulations,” empowered the Council to compel the owners of dogs to obtain badges for them at a nominal charge, and to enact that any dog found in the streets without such a badge should be destroyed. The Court, however, seems to have gone almost entirely on the ground that this was really a regulation for a purpose of general utility *in eiusdem generis*—namely, in order to prevent the nuisance of the town being overrun, like Constantinople, by innumerable ownerless dogs. In fact, so far back as 1836 an Ordinance was passed “for abating the nuisance occasioned by dogs roaming at large in and about Capetown”—the preamble stating: “Whereas the inhabitants of Capetown suffer great annoyance by reason of the number of unowned dogs that roam at large in the streets and thoroughfares in and about Capetown, and it is expedient to authorise measures to be taken for the abatement of the said nuisance,” &c. (Ordinance 14 of 1836). The regulation impugned in that case was in short found to be a reasonable one in itself, one for which there was a great deal of precedent, and which might fairly be taken to fall within the meaning and intent of the clause under which it was framed, and it was therefore upheld. It does not appear to me that the regulation before us can be upheld on any of these grounds. There are, no doubt, certain expressions in the Grahamstown and Capetown cases

1884.
March 17.
” 31.

Pickering vs.
Kimberley
Town Council.

1884
March 17.
„ 31.
Pickering vs.
Kimberley
Town Council.

which may be cited in favour of the respondents, but these were expressions which do not appear to me to have been necessary to or the main reasons for the decisions, and these expressions, which are really in the nature of *obiter dicta*, must be regarded as to some extent qualified by the decisions in *Commissioners of Cradock vs. Du Plessis* and *Button vs. Municipality of East London*. On the whole, therefore, I am of opinion that the conviction in the present case cannot be supported on the authority of the above cases, and that, for the reasons I have given, it must be quashed.

Appeal allowed, and conviction quashed accordingly, with costs.

[Appellant's Attorneys, STOW & CALDECOTT.
Respondents' Attorneys, CORYNDO & CALDECOTT.]

McFARLAND vs. DE BEER'S MINING BOARD.

Proclamation 6 of 1874 and Ordinance 21, 1880, Griqualand West.—Powers and duties of Mining Boards.—Mining area.—Lateral support.—Costs.

By a local Proclamation and Ordinance, the De Beer's Mining Board has jurisdiction over a certain mining area, which is defined as limited by the boundary of the Vooruitzicht estate. The Board is empowered to levy rates for the removal of reef, &c., on the various sections into which the mine is divided, and its bye-laws provide that the rates levied on each section shall be expended solely on the removal of reef, &c., which may fall into or become dangerous to that section.

Held, that the Board, having levied rates on a certain section in the mine, was not thereby rendered liable to remove or pay for the removal of certain reef which had fallen into or become dangerous to that section, but which came from private property outside the Vooruitzicht estate, and over which the Board had no statutory jurisdiction, and the

owners of which were entitled, as against the proprietors of the mining area, to lateral support.

The declaration in this action set forth that the plaintiff was a miner and the lessee of the claims, machinery, depositing floors, &c., of the Petree Diamond Mining Company, Limited, of De Beer's Mine, and that as lessee of the said Company he carried on mining operations in their claims with the knowledge of the defendant Board; that the Mining Board, on or about January 17, 1881, divided the De Beer's Mine into sections by virtue of the powers vested in them by their 13th bye-law, and for the purposes therein set forth [a copy of the 13th bye-law was annexed to the declaration, and was in the following terms: "That the Mining Board shall be empowered to divide the mine into sections, and that the amount of rates contributed by each section be expended solely on and for the benefit of the claims in such section or divisional section for the purpose of removing reef, water, &c., in such manner as the Mining Board shall direct; and that separate accounts be kept of the expenditure in such sections respectively; the divisions to be made according to the plan drawn by the mining overseer, dated 27th August, 1877; any section indebted to the general funds of the Board shall be charged interest and debited at the rate of nine per cent. per annum"]; that the said claims of the Petree Company were situate in Section B, and that rates had been imposed by the Mining Board for the purposes of carrying out the said bye-law and of removing reef surrounding the margin of the mine which might be dangerous to the claims in the said section; that it thereupon became the duty of the said Board to remove reef, debris, &c., from the said claims in the said section, and to provide for the removal of reef from the margin of the mine dangerous to the said section; that on or about October 10, 1883, certain reef from the margin of the mine had fallen into the said claims of the said Company situate within the said section, and other reef upon the margin of the mine became dangerous and threatening to the said Company's said claims and to the remainder of the said section; that the Inspector of Mines, on the 12th October,

1884.
March 18.
" 20.
" 31.
—
McFarland vs.
De Beer's
Mining Board.

1884.
 March 18.
 " 20.
 " 31
 ———
 McFarland vs.
 De Beer's
 Mining Board.

1883, ordered the plaintiff to stop work in the said claims on account of the dangerous condition of the said neighbouring reef; that the Mining Board was requested by the plaintiff to remove such reef as had already fallen into his claims, and to provide for the safety and removal of the said dangerous reef, but the Board refused and neglected to take any steps for the removal or security of the said reef; that thereafter, between August 27, 1883, and January 1, 1884, the plaintiff was compelled to remove, and did remove, the reef from the said claims, and was compelled to and did cut down and remove the reef dangerous to the said claims and to the other claims in the said section; that the reef so hauled, cut down, and removed had been measured by the mining overseer of De Beer's mine, and the compensation for the work done at the usual tariff price fixed by the Mining Board was £1914 4s. 4½*d.*, which sum the defendant Board refused, &c., to pay. The plaintiff claimed the said sum, together with interest and costs.

Before pleading, the defendants by letter asked to be informed *inter alia* from what estate the reef fell into the Petree claims; and upon what estate the "other reef" referred to in the declaration, as having become dangerous to the said claims and to the said section, stood. They were informed that the reef fell into the Petree claims partly from the Vooruitzigt estate (the property of the Colonial Government) and partly from the Bultfontein estate (the property of the London and South African Exploration Company, Limited); and that the "other reef" which became dangerous, and to which the stop-order from the Inspector of Mines applied, stood partly upon the Vooruitzigt estate, and partly upon the Bultfontein estate. Thereupon the defendants tendered the sum of £300 with taxed costs to date on account of the reef hauled, cut down and removed from the Vooruitzigt estate. This tender was accepted by the plaintiff in full satisfaction of his claim for the work done by him in consequence of falls from, or danger arising from, reef standing on the Vooruitzigt estate; but he stated that he would proceed with his claim for the balance.

The defendants then pleaded, admitting the allegations in

the declaration from the beginning to and inclusive of the bye-law above quoted, but, save as thereafter admitted, they denied by their plea the remainder of the allegations contained in the declaration. The plea then proceeded: "The De Beer's Mining Board have only jurisdiction and control over the mining area of the De Beer's Mine, the limits of which are defined and set forth by Proclamation 6 of 1874 and Ordinance No. 21 of 1880. The mining area is bounded on that side of the De Beer's Mine on which the claims worked by the plaintiff are situated by the boundary line of the farm Bultfontein, the property of the London and South African Exploration Company, Limited. The said mining area does not extend beyond this line, and the defendant Board has no right, powers or control over the said farm Bultfontein or any portion thereof. The reef referred to in the declaration as cut down and having been removed by the plaintiff consisted partly of reef under the control of the defendant, and partly of reef situate on portion of the said farm Bultfontein and beyond the control and out of the jurisdiction of the defendant." The plea then set forth the tender by defendants of £300 in respect of the reef, &c., within their jurisdiction, and the acceptance thereof by the plaintiff in full discharge of that portion of his claim, and proceeded as follows: "As regards the claim for reef work done by the plaintiff on land situate without the limits of the mining area, the defendants say that the same was not done at their instance or request, and that they are not liable to the plaintiff in respect thereof; they say that the sum tendered by them and accepted by the plaintiff is sufficient to satisfy his claim, and that they are not liable to him in respect of any other sum claimed in this action."

The replication admitted that portion of the reef was situate on the farm Bultfontein, and save as to that allegation, and save as to admissions contained therein, it denied the allegations in the pleas. The replication proceeded as follows: "The plaintiff further says that the De Beer's Mine *de facto* extends beyond the area as defined by Proclamation 6 of 1874 and Ordinance 21 of 1880, and that the defendant Board has jurisdiction over the whole of such

1884.
March 18.
" 20.
" 31.
—
McFarland vs.
De Beer's
Mining Board.

1884.
 March 18.
 " 20.
 " 31.
 ———
 McFarland vs.
 De Beer's
 Mining Board.

mine. As a further answer to the plea the plaintiff says that the defendant Board has always exercised jurisdiction over the whole of the *de facto* mine and the margin surrounding it, and has levied rates on claims leased to the plaintiff, although situate beyond the area defined as aforesaid, for the purpose of removing reef, debris, &c., from the mine or margin surrounding the mine, and the defendant Board is thereby bound to satisfy the plaintiff's claim. The plaintiff further says that even if the defendant Board has no jurisdiction over the margin of the mine situated upon the farm Bultfontein, yet they became liable to provide for the removal of such portion of the margin aforesaid as fell into the limits of the mining area. Portion of the plaintiff's claim (for which portion there has been no tender) is in respect of the removal of reef and debris which had so fallen into the limits of the mining area."

The rejoinder was general.

A large amount of evidence was led, but the real issue which had to be determined in the case was whether, under the Proclamation 6 of 1874 and Ordinance 21 of 1880, the defendant Board was bound to remove, or pay for the removal of, the reef which had fallen, or which had become so dangerous that its removal became necessary, and which was situate on that portion of the margin of the mine which lay beyond the boundary of the Vooruitzigt Estate, and was situate on the private property of the London and South African Exploration Company. Among the questions raised by the evidence were the exact boundary of the two properties, the knowledge possessed by the plaintiff of such boundaries, the circumstances in which claims had been taken out and worked by him and his predecessors in title beyond the boundary of Vooruitzigt, the extent to which the plaintiff by his own working had caused the reef to fall or to become dangerous, and the question whether the defendant Board by levying rates on all the claims worked by the plaintiff had incurred any liability *quasi ex contractu* for the removal of the whole of the dangerous reef contiguous to such claims.

At the conclusion of the plaintiff's case,

Forster (with him *Lange*), for the defendant Board, applied

for absolution from the instance, on the ground that the whole of the reef in question had proved to be without the mining area. If rates had been taken for a claim which had now been proved to be outside the area, they had been levied under a *bonâ fide* mistake as to the boundary. He referred to Ord. 5, 1874, which had been repealed, Procl. 6 of 1874 and Ord. 21 of 1880. The boundary of the Bultfontein estate limited the area, and if the Board attempted to exercise jurisdiction beyond it they would be trespassers. It was never intended by Government that the Board should exercise *dominium* over other than Crown lands. He referred to Ord. 10, 1874, and the repealed schedule to Procl. 8 of 1880, section iv. sub-sect. 2-4, sect. v. sub-sect. 1; Act 29, 1883, sect. 39. Both parties had been under a common belief that the whole of the mine was situated within the Vooruitzigt estate. There had been no contract between the plaintiff and the Board to remove this reef. The plaintiff knew that he was hauling Bultfontein reef, and that the defendants had always repudiated any liability in respect of the same.

Hoskyns, C.P., for the plaintiffs, contended that the defendants had shewn no ground of non-liability for the reef which had actually fallen into and been hauled from claims on which rates had been levied. The Mining Board ought to know the limits of their own powers, and could not repudiate on the ground of common mistake. The plaintiff had been led by the Board to believe that he was in the same position as other claimholders. He referred to sect. 39 of Act 29, 1883, and contended that the Board had jurisdiction over the whole of the *de facto* mine.

Hopley followed on the same side, and argued that the Board, having been called into existence for certain purposes, had power to do everything necessary for their accomplishment; *Maxwell on Interpretation of Statutes*, 317-319.

Forster replied, and contended that this reef had been brought down by the plaintiff's working and the defendants were not liable for its removal; he referred to *De Beer's Diamond Mining Co. vs. Victoria Diamond Mining Co.* (High Court, not reported). An action for trespass for this work on the part of the owners of the estate would lie against the plaintiff. In circumstances like these the claimholder on

1884.
March 18.
" 20.
" 31.
McFarland vs.
De Beer's
Mining Board.

1884.
 March 18.
 " 20.
 " 31.
 —
 McFarland vs.
 De Beer's
 Mining Board.

the border must work at his own risk. As to taking rates, the plaintiff himself did not know till after the pleadings were closed the real facts as to the boundary.

BUCHANAN, J.P., said that the majority of the Court (LAURENCE, J., *dissentiente*) was of opinion that absolution should be refused, on the ground that there was a *prima facie* case with regard to the reef which had actually fallen and then been hauled by the plaintiff, though not as to that which had been worked down by him.

Evidence for the defence was then led (the effect of which will fully appear from the judgments given below) and counsel having again addressed the Court,

BUCHANAN, J.P., intimated that the Court was unanimously of opinion that the defendant Board was entitled to judgment, but as the case was of importance written judgments would be delivered on a later day.

Hoskyns, C.P., with regard to the question of costs, argued that the defence should have been raised by exception, and that the plaintiff should not be compelled to pay the defendant's costs of action: *Alexander vs. Armstrong*, Buch. 1879, 263.

LAURENCE, J., referred to *Kimberley Mutual Building Society vs. Lewis*, and *Mahadi vs. De Kock* (H. C. Reports, vol. i. parts 2 and 3).

Forster replied that the plaintiff could have excepted to the plea if he had chosen, and it had in fact been drawn for that purpose, but part of the replication could not be dealt with by exception. There were several points on which evidence was necessary, as had been shewn by the refusal of absolution.

Cur. adv. vult.

Postea (March 31).—

BUCHANAN, J.P., said:—This was an action, originally, for £1914 4s. 4½d., now (by an accepted payment on account)

for £1614 4s. 4½d., as an amount alleged to be due by defendants to plaintiff for work and labour done in hauling reef. The pleadings set forth that the plaintiff is a miner and the lessee of the Petree Diamond Mining Company, working in De Beer's Mine, and that defendant is chairman of the De Beer's Mining Board, in which mine the plaintiff carried on work; that the De Beer's Board in January 1881 divided the mine into sections under bye-law 13; that the Petree claims are in Section B; that the Board *inter alia* imposed rates for the removal of reef; that it was then the Board's duty to remove reef, debris, &c., from the claims and reef from the margin of the mine; that on the 10th of October, 1883, some margin reef fell into the claims, and other parts of it became dangerous; that on the 12th of October the inspector of the mine ordered plaintiff to stop working; that the plaintiff requested the Board to remove the reef, which they refused; that in periods between the 27th of August, 1883, and 1st of January, 1883, the plaintiff did the work; that Rausch, the Board's engineer, measured the quantity removed and found the amount due to be the amount claimed. The defendants admit capacities and the division of the mine into sections, but deny *ultra*. Their defence is that the Board has only jurisdiction over the mining area, which is defined; that on the plaintiff's side of the mine it is bounded by the boundary line of Bultfontein, the adjoining farm, over which defendants have no control; that part of the reef claimed for (this was when the summons stood at £1914) is outside that line; that the defendants were always ready to pay for the amount of reef removed within the mine and tendered £300 therefor and costs, which was accepted by the plaintiff. As to the outside reef, the defendant denies liability. He denies the amount measured and the amount due, stating that the tender is sufficient to cover all. In his replication the plaintiff admits that part of the reef hauled was on Bultfontein, but says that the De Beer's Mine *de facto* extends beyond the mine itself and that the Board has jurisdiction beyond; that the Board always exercised such *de facto* jurisdiction and levied rates outside; that even if it has no jurisdiction over the margin it is liable for removal of out-

1884.
March 18.
" 20.
" 31.
—
McFarland vs.
De Beer's
Mining Board.

1884.
 March 18.
 „ 20.
 „ 31.
 —
 McFarland vs.
 De Beer's
 Mining Board.

side reef when fallen into the mine. From the evidence it appears that the De Beer's Mine is situated on the Vooruitzicht estate, the property of the Government, and borders on Bultfontein, which is the property of the London and South African Exploration Company. The mine was laid out several years ago, but the first plan of it put in proof is the one of August 1877, made under the bye-law after the mine was sectionised. That plan shews part of claim 45, but not 44 and 43, nor any claims from 1 to 16 to the S.E. As all the claims are consecutively numbered, as far as they appear on the plan, it is evident there was some rough plan when the mine was first laid out, on which, probably, appeared some additional claims in this direction. As is not unusual in the original laying out of these mines, unless the reef is carefully sunk for all round before any claims are allotted, some claims originally numbered on the rough plan, or pegged out on the surface, are really on the reef and therefore worthless, at the surface certainly, for which reason they, not having any actual value, disappear from subsequent plans made when the mine is more tested; or, as in this case, partially reappear on the plan when the mine is worked down and good claims are found cutting in under the upper reef. But I refer to this as shewing that the very first plan put in, on which the mine sectionised began, as it were, a new era of its existence, points to all claimholders or intending claimholders the fact of something needing attention in that direction, whatever the cause—reef or disputed boundary. The two extremities of the boundary line between Bultfontein and Vooruitzicht being fixed, it was known that there was such a boundary line in the vicinity, although from the irregular and careless manner which characterised the earlier working of these mines it was not pegged out along its length, at proper intervals, a necessary work, which it seems is now being done, which if earlier done would have saved a deal of trouble and expense. On the second plan, according to date put in, that of August 19th, 1881, 44 and part of 43 appear on row 2, and 5 on row 1 to the south. In that of September, 1881, the photographed plan made for greater convenience of claimholders, 45, 44, and 43 appear, but not in figures 5 or 4, although there are

shaded spots left beyond intimating more possible claims, if these spaces mean anything at all. On the plan of assessment of 1882-83 part of 4 puts in appearance, and all those just named also appear on an important document, according to which the Petree Company for some of these claims paid rates. No. 5 is valued at £1500, but the rating clause is not filled in, and the claim is distinctly stated to be on Bultfontein; there is also an important addendum made, according to Mr. Bourhill, the Board's secretary, at the request of the Petree Company. "Add $43\frac{1}{2}$, $82\frac{1}{4}$, $121\frac{1}{2}$, $122\frac{3}{4}$, in all $1\frac{1}{2}$ claims to be added to the 23 Petree claims originally on the list." The general rate to be paid by the Company is reckoned on that basis, thus clearly excluding, as far as this document goes, No. 5, and not mentioning No. 4, which the secretary explains the Board would not include in the assessment, as it considered it had no right to rate it. The bye-law imposing the rate provides that it is levied for removal of reef, water, debris, &c., in such manner as the Board shall direct. The plaintiff was originally a partner with Petree, under the style of Petree & McFarland. Their claims afterwards became the Petree Company, from whom the plaintiff leased them in 1882, since which he has worked them alone. Before August 1883 certain reef had become dangerous, and was "pegged" out by the mining overseer, as appears from plaintiff's own letter to the defendants, dated August 27th; so here was opportunity for full inquiry before plaintiff worked down. He tendered to cut down and haul it at the usual tariff, but his tender was only accepted for Vooruitzicht reef, another reason for making him careful. The stop order of 12th October mentions, *inter alia*, 5, 44, 45, 83, 84, 85, as being claims in which the plaintiff is to stop working until the main reef south of claims 5 and 6 is made safe, and there is no contradiction of the evidence, when this stop order was put in by the plaintiff, that the plaintiff had worked where stopped. On 22nd December Rausch measured the quantity of reef and debris plaintiff had at that time removed, and in his certificate, which distinctly states that such removal was from the Bultfontein estate, puts the labour at £1684. There was then a portion of dangerous reef still standing to be removed, which was after-

1884.
 March 18.
 " 20.
 " 31.
 —
 McFarland vs.
 De Beer's
 Mining Board.

1884.
 March 18.
 " 20.
 " 31.
 —
 McFarland *vs.*
 De Beer's
 Mining Board.

wards removed. The receipts for rates taken by the Company from the plaintiff shew no numbers of claims, but merely the sections and amounts. This is not accurate, and the insertion of the claims might save future trouble. The receipt contains the printed word "No.," shewing the original idea of the necessity of the filling-in of the numbers, but this important word is simply scored for the ease of the moment. In November 1883 plaintiff addressed the Board through his attorney, stating that he had cut down 4120 loads, for which he asked payment at the ordinary rate of 3s. 9d. per load. He added: "It may be contended that portions of the reef hauled by Mr. McFarland was situated on ground belonging to the London and South African Exploration Company, but, on the other hand, I must point out that not only was the reef in question within the mining area, and thus within the control of the Board, but the hauling of it was as much for the benefit of the whole mine as any other that may have been hauled from any other part of the mine," so that he hoped his claim would receive the Board's "favourable consideration." He also claimed £600 as damages for non-protection from reef, which claim has since been significantly withdrawn. The Board replied denying all liability, but afterwards tendered £300, the balance due for reef plaintiff had hauled under the authority of the Board on a resolution of August 27th, 1883, following his tender to haul of that date. That resolution is important as drawing a clear distinction as between Vooruitzigt reef and other reef, and plaintiff's tender was accepted so far as the removal of dangerous reef on the Vooruitzigt estate was concerned. This plaintiff accepted, not retiring from his previous position as to the other reef. In reply to "particulars" asked for by the defendant in January 1884, it should also be noticed that the plaintiff mentioned, as his claims leased from the Petree Company, 44, 45, 83, 86, and others, although in his evidence he spoke differently and doubtfully as to some. Now plaintiff was in January 1881 a member of the De Beer's Board, and as such was deputed to Capetown to interview the then Commissioner of Crown Lands on certain points stated in a memorandum drawn up for the purpose, one of which points was with reference to the reef along the

margin of the mine on the S.E. side, and what was to be done when it became dangerous. Plaintiff saw the Attorney-General of the day, who advised that the best course was to give the manager of the London and South Africa Exploration Company notice that the Board intended to remove, and after receiving his answer communicate again with him. The Attorney-General did not think that the Company, if properly addressed, would raise any objection to the removal of the reef in question by the Board. But there, as far as we know in this case, the matter seems to have ended. Yet this shews, clearly as knowledge can be shewn, plaintiff's knowledge three years ago. Now if McFarland before working at the reef had done what he did very lately, authorised a survey by surveyor Tucker, he would have found that the boundary line between Vooruitzigt and Bulfontein crosses 45, 44, 43, 83, 89. One would have thought that the employment of a surveyor was the first act of a cautious man under any similar circumstances, but especially with McFarland's own knowledge, pointedly obtained, that there was at all events a question as to boundary in that direction. A cautious man does not work on uncertain ground, if he does he does it at his own risk; and much as one may regret for plaintiff's own sake the result of this case, it is a position he has deliberately put himself into. He says he knew nothing of No. 5, and yet it is proved he bought No. 5, as he, or Petree and McFarland, bought other claims, the existence of which he doubts in his evidence before this Court. It seems to me that McFarland must have known where the boundary ran, and that, for some reason as to which it is immaterial now to inquire, he worked across it without, and in the blue against the reef within, as the evidence, though not so strong as it might have been, certainly sufficiently satisfies me he did. On August 17, before his own letter to the Board, he is warned by Mr. Kilgour, on Miss Robinson's complaint in writing, and verbally on the ground, and a wire is stretched by Mr. Kilgour in about the direction, as he swears, of Tucker's subsequent line, the accuracy of which he (Kilgour) admitted. This must have shewn McFarland the more the risk he was taking, but he continued to take it. At the time there was already a working over the line, which

1884.
March 18.
" 20.
" 31.
—
McFarland vs.
De Beer's
Mining Board.

1884.
 March 18.
 " 20.
 " 31.
 ———
 McFarland vs.
 De Beer's
 Mining Board.

increased until the fall in October. Now the total amount hauled was 11,340 loads, 9990 admittedly picked from Bultfontein, and 1350 admittedly fallen from Bultfontein. As to the 9990, there was no contract to remove with the Board, in fact there was a warning not to remove. The Board saw all along, from 1881 downwards, the danger of trespassing on the Bultfontein estate. That was one of the chief things it wished to avoid, as the secretary tells us, and the chairman of the Board tells us that McFarland was in particular warned from working vigorously in that direction. McFarland himself admits that during his time of membership it was the Board's wish not to interfere with the Bultfontein estate, and yet he also admits, "the stuff I removed I always removed as Bultfontein stuff." He would have us believe that 4, 5, 42, &c., did not exist in January, and that he only heard of 43 six months ago. Before he did the work he knew from Rausch that the Board was in hopes of arranging with Government as to the reef in question, which shews the need of some arrangement, which McFarland was perhaps too sanguine would go through and ultimately right him. This point he knew long before, and did not first hear of the necessity from Rausch. In fact, his own evidence on the main points told greatly against himself. Though he would have us believe he did not work 5, 6, half 43, 42, 82, or 121, the contrary is the case, and he admits having worked 66 close up to the reef, part of 66 being also the boundary line as shewn by Tucker, whose authority he cannot do otherwise than say he will not dispute. When pressed as to how if part of 43 is over the line, as it is, he says, "if that is so, he does not know it to be the case," but he has taken the risk. There being then no contract between the Board and McFarland to remove these 9990 loads from the Bultfontein estate, it is unnecessary further to enter into the interesting arguments as to what would have been the Board's liability if it had authorised contracts beyond its boundary, or the question whether it could validly give such permission, or whether the party it authorised could recover on any indemnity even if given on such a mandate (*Voet*, 4, 3, 1). The more difficult question is really now as to the 1350 loads which fell from Bultfontein, and the first point to consider is,

did it fall through plaintiff's working? I am satisfied on the evidence it did. Now Bultfontein is entitled to lateral support from the Vooruitzigt estate. That was admitted by the *Crown Prosecutor*, and it could not be successfully disputed. It was a matter of much discussion in the first cases which went from this Court to the Appeal Court whether claimholders *inter alia* were not bound to give each other lateral support, but that idea eventually vanished, and it was held that as the object of claimholders going into a mine is to work down, and as they are bound so to do to avoid negligence, one claimholder is not entitled to lateral support from another (*Van Beek vs. Murtha*, Buch. C. A., 1, 121). But this, it was admitted, was an exception to the right of neighbouring proprietors to lateral support. Vooruitzigt estate then being obliged to give Bultfontein lateral support, neither Government nor the Mining Board intended or had any right themselves to interfere with that support. They certainly could give no greater right than they had. It seemed gravely argued that as it is an obligation (an obligation assumed) on the part of the Board to remove all reef and water from the mine, the Board had the right to trespass on Bultfontein if necessary so to do. But that argument was clearly untenable. The boundary line, as fixed by statute, of the mining area being the boundary line between the two estates, the Board could legally authorise nothing beyond its own area. The chairman, on the point of lateral support, swore that it was the custom of claimholders in the De Beer's Mine working against reef to leave a shell of blue as lateral support, but, whether this is so or not, if the lateral support is interfered with whoever does so is liable. And, as I have said, I am satisfied on the evidence that the plaintiff did so. But it is said the Board accepted rates from the plaintiff, over the border as well as within, and is therefore estopped. Now the only claims outside the boundary, as eventually shewn by Tucker, on which it took rates, were as to parts at all events within the mine, and it was therefore justified in taking rates for them. I do not believe the Board either ever decidedly knew it was taking rates over the boundary as a fact, nor intended so to do. Plaintiff may be entitled to recover a proportion of rates thus paid, but he cannot

1884.
 March 18.
 " 20.
 " 31.
 ———
 McFarland vs.
 De Beer's
 Mining Board.

1884.
 March 18.
 „ 20.
 „ 31.
 —
 McFarland vs.
 De Beer's
 Mining Board.

found on the Board's reception of rates as giving the rights he claims. Where the Town Council was held by this Court bound on acceptance of rates, was clearly for rates levied within undoubted municipal limits (vide *Mathieson vs. Town Council*, H. C., not reported, and *Murtha vs. Town Council*, H. C. Repp. i., 323), and the point even as to the effect of *such* acceptance was not decided in either case on appeal. It was also argued that the Board is bound to haul reef and water from within the mine, never mind how it gets there from beyond; but this has never been so decided. The decision in *De Beer's Company vs. Victoria Company*, even if that case did raise, on the pleadings, the obligation of the De Beer's Mining Board to remove from the De Beer's Company's claims water sent into them by the tortious act of the Victoria Company, did not go on that point, which was not seriously argued at the bar in that case. The decision held the Victoria Company liable for its tort. And if similarly in this case it was the negligence of the plaintiff which caused the fall, his is the responsibility. The removal, he says, was for the good of all the mine, but a similar argument was used as to water in the Victoria Company's case, without effect. That Company was condemned in damages for its individual injury to the De Beer's Company, although it may be that the Victoria Company's act relieved the whole mine from much water by the shaft which it sunk, draining the mine and concentrating the flow of water. On the whole case there must thus be judgment for the defendants. The question of costs remains to be considered. The plaintiff strongly urges that he should not pay the full costs of an action, as the question in dispute might have been raised on an exception. I have given my most anxious consideration to this request also since the last hearing, as I fully feel this may be, as his learned counsel argued in first inducing us to hear the case out of term, a serious case for the plaintiff. But I cannot see any good reason why costs should not follow the result, as urged.

JONES, J., said:—The plaintiff (lessee of the Petree Diamond Mining Company) sues the Chairman of the De Beer's Mining Board for £1914 1s. 4½d., but now altered to

£1614, with interest and costs of suit, and alleges as the ground of indebtedness the following circumstances: That the defendant Board, under bye-law 13, divided the mine into sections and imposed rates upon the claims plaintiff worked in that section, "for the purpose of carrying out the said bye-law and removing the reef or margin surrounding the said mine, which might be dangerous to the claims in the said section," and that it "thereupon became the duty of the Board to remove debris, &c., from the claims in the said section and to provide for removal of reef from the margin of the mine dangerous to the said section;" that on the 10th of October, 1883, certain reef had fallen into the plaintiff's claims, and other reef upon the margin became dangerous; that on the 13th the plaintiff was ordered to stop work by the Inspector of Mines on account of the dangerous condition of the claims, but as the Mining Board did not remove the fallen and dangerous reef the plaintiff had to do it himself, and for the work done in this hauling, cutting down, and removal of reef and debris the plaintiff claimed £1914 4s. 4½d., an amount arrived at by the Mining Overseer, allowing the usual price fixed by tariff, viz., 3s. 9d. per load. The defendant's plea specifically alleges that portion of the reef removed was beyond its jurisdiction as defined by Proclamation No. 6 of 1874, and Ordinance No. 21 of 1880, and sets out an accepted and admitted tender of £300 as to that portion of reef which came within its jurisdiction, viz., the limits of the Vooruitzigt estate, and alleges non-liability to the plaintiff in respect of any other sum claimed in this action. In reply to this the plaintiff says that De Beer's Mine *de facto* extends beyond the area as defined by proclamation and ordinance, and that the defendant Mining Board has jurisdiction over the whole of such mine, has always exercised it, and levied rates on the claims leased to the plaintiff, although outside the area, and even if the Board has no jurisdiction beyond the limits of the Vooruitzigt estate it is liable to provide for the removal of "such portion of the margin as fell into the limits of the mining area." It is important to note that the bye-law to which the plaintiff refers in his declaration was published in Government Notice No. 59 of 1881, and is in the following

1884.
 March 18.
 " 20.
 " 31.
 —
 McFarland vs.
 De Beer's
 Mining Board.

1884.
 March 18.
 " 20.
 " 31.
 McFarland vs.
 De Beer's
 Mining Board.

terms:—"That the Mining Board be empowered to divide the mine into sections, and that the amount of rate contributed by each section be expended solely for the benefit of the claims in such section or divisional section for the purpose of removing reef, water, debris, &c., in such manner as the Mining Board should direct, and that separate accounts be kept of the expenditure in such sections respectively, the division to be made according to the plan drawn by the Mining Overseer, dated 27th of August, 1877." Upon referring to this plan one is at once struck with the fact that the limits of the mine, as shewn in it, fall entirely within the Vooruitzicht estate as shewn in Tucker's plan. The boundary of the mine is shewn passing through claim 45 diagonally, through the lower portion of claim 84, then cutting off part of 83 and nearly the whole of 82. Claims 4, 5, 42, 43, 44, and parts of 82 and 45, are beyond its limits altogether. From the evidence of Mr. William B. Smith it appears that the licences for the claims which fall on the Bultfontein ground were taken out by Mr. George McFarland, the plaintiff, acting on behalf of the Petree Company, after July, 1880. As early as January, 1881, the plaintiff was well aware that the reef on the south-east side of the mine fell within the boundary of the Bultfontein estate, and we find that he interviewed Mr. Upington (the then Attorney-General) on the subject. The plaintiff reported to the defendant Board that Mr. Upington informed him "that when the reef along the margin of the mine on the south-east side became dangerous to the working of the claims in that part of the mine, the best course for the Board to adopt would be to give the Manager of the London and South African Exploration Company notice that the Board intended to have the dangerous portions removed in the usual manner, and after receiving an answer to forward it to him (Mr. Upington), only he wished to impress upon the Board the necessity of carrying on all correspondence with the Manager of the London and South African Exploration Company through the Board's legal advisers." With regard to obtaining a right of road round the south-east side of the mine, Mr. Upington was of opinion that it fell within the province of the Commissioner of Public Works. It cannot be said that the

plaintiff was ignorant of the state of the case and that he acted without warning, nor can it be fairly contended that his position is in any way similar to that of the ratepayer who, in ignorance of his legal position, for years pays rates to a municipal corporation, under the mistaken impression, shared in by the municipality, that his land falls within the limits of the municipality. McFarland knew that the boundary line of the Bultfontein estate cut off reef which was, early in 1881, looked upon as a possible source of danger to his claims, and it may fairly be said that he was put upon inquiry as to where this boundary was. If he made no inquiries he worked at his own risk. I do not think that the mere fact of the claims 43, 44, and 45, or portions of them, subsequently appearing in the assessment rolls and plans altered the legal position in which the plaintiff stood towards the Board. I take it that the chief reason for these claims being placed on these later plans was the fact that the Petree Company held licences for them from the registrar of claims, and that they were worked. Now, in the view which I take of the facts, the plaintiff as the holder of a licence from the owner of Vooruitzigt could have no greater rights than the proprietor himself. As between the owners of the adjoining properties, Bultfontein and Vooruitzigt, the common law right of lateral support would exist; and therefore the licence granted by the owner of Vooruitzigt could not confer upon the Petree Company, or McFarland, the right so to mine as to deprive the neighbouring proprietor of lateral support. Is there anything in the mere fact that the licence is for the purpose of mining, which changes the legal rights these owners possessed? I confess I cannot see in what manner this would make a difference, and I do not find anything in the statutory provisions of the various legislative enactments, dealing with mining interests, which has changed the common law doctrine. From the evidence I think that plaintiff must have worked within the Bultfontein boundary line in portions of claims 43, 44, 45, and 83. I cannot help arriving at the conclusion that the working of the plaintiff both on Vooruitzigt and Bultfontein naturally tended to increase the danger from reef situate on the London and South African Company's estate. The plaintiff could not be

1884.
 March 18.
 " 20.
 " 31.
 McFarland vs.
 De Beer's
 Mining Board.

1884.
 March 18.
 „ 20.
 „ 31.
 —
 McFarland vs.
 De Beer's
 Mining Board.

justified in calling upon the Board to commit a trespass and enter the Bultfontein estate for the purpose of removing a danger, which was the result of taking away lateral support to which the London and South African Company were entitled. I do not think that he could call upon the Board to remove reef which, in consequence of the illegal act of the plaintiff himself, fell from beyond its mining area into claims within its jurisdiction. In the view which I take of the facts, it is unnecessary for me to deal with the legal question which may arise as to the suggested liability of the Board under the particular terms of this bye-law. I concur in holding that judgment should be given for the defendant Board and with costs.

LAURENCE, J. :—In this case I concur in the judgment in favour of the defendant Board, and substantially also in the reasons for that judgment which have been given. I wish, however, to add that while I quite agree with the legal principles which have been enunciated, and in their applicability to the case before us, I do not altogether base my judgment on the ground that it has been proved in evidence that the ground from the Bultfontein estate which fell into the mine, and for removing which the plaintiff seeks to make the defendants liable, was brought down and fell into the claims owing to the plaintiff's working below it. As far indeed as I can see, the plaintiff's working must have been the cause of the fall, and there is no other cause to which it is easy to attribute it; but if it rested with the defendants to clearly prove that this was so, I am bound to say that I think the legal proof is not complete. Some hypothetical statements were made by the witnesses called for the defence, but no direct evidence was adduced, as I suppose it might easily have been, on this point. I am prepared, however, to give judgment for the defendant, as I was prepared, at the close of the plaintiff's case, to give absolution from the instance, on the ground that, in the absence of proof on the part of the plaintiff that this ground fell into the mine owing to some act or negligence on the part of the defendant, the defendant is not responsible for the cost of its removal, and the Board's liability is no greater in respect of the ground which fell

from Bultfontein than in respect to that which the plaintiff worked down from Bultfontein, with regard to which latter we were all satisfied at the close of the plaintiff's case that the defendant was not liable. The De Beer's Mining Board has jurisdiction only within the legally constituted mining area; and by Ordinance 21 of 1880 the mining areas are legally constituted only "so far as the same are situate on the Vooruitzigt estate." Over the soil of the neighbouring estate of Bultfontein the Board has no jurisdiction or control, and I cannot see how it can acquire such jurisdiction or control, or any consequent liability, owing to the ground in question having, without any fault on the part of the Board, been brought over the boundary of the two estates. The plaintiff, in the second paragraph of his replication, says that the De Beer's Mine *de facto* extends beyond the area as defined by Proclamation 6 of 1874 and Ordinance 21 of 1880 (which seems to be the case), and that the defendant Board has jurisdiction over the whole of such mine (which, taking the former statement to be correct, is not the case). He also says that the Board has always exercised jurisdiction over the whole of the *de facto* mine and the margin surrounding it; but from the evidence it appears that the Board has always guarded itself against assuming any jurisdiction beyond the boundary, so far as it was ascertained; and some time before this reef fell the plaintiff admits that he was informed by the Mining Overseer that, unless some arrangement could be effected with the Exploration Company, the Board could not undertake any responsibility with respect to the Bultfontein reef. Further, the plaintiff alleges that the Board "has levied rates on claims leased to the plaintiff, although situate outside the area defined as aforesaid, for the purpose of removing the reef, debris, &c., from the mine or margin surrounding the mine." There seems to be some doubt as to what rates have been actually levied by the Board, but it is clear that they have not knowingly levied any rates on any claim outside the boundary of Vooruitzigt; and if any such rates have been levied by inadvertence, it was the natural result of the action of the plaintiff, his lessors, or their predecessors in title, in obtaining licences for

1884.
 March 18.
 " 20.
 " 31.
 ———
 McFarland vs.
 De Beer's
 Mining Board.

1884.
 March 18.
 " 20.
 " 31.
 ———
 McFarland vs.
 De Beer's
 Mining Board.

such claims, not from the Board, but from the Registrar, as the representative of the Government, the owners of the Vooruitzicht estate. If any rates have been paid by the plaintiff to the Board in respect of any claim ground not under their control, it would appear that such rates were levied and paid *bonâ fide* and under a mistake common to both parties, and the case may possibly be one in which there is such a natural equity as would justify the plaintiff in demanding the return of such payments. This, however, is not the question now before us. Lastly, the plaintiff alleges that "even if the Board has no jurisdiction over the margin of the mine situated on the farm Bultfontein, yet they became liable to provide for the removal of such portion of the margin aforesaid as fell into the limits of the mining area." This contention is based on the 13th bye-law annexed to the declaration, which provides for the removal of reef by or at the expense of the Board; but that bye-law merely provides for the sectionising of the mine and for the expenditure of the amount of the rates contributed by each section "solely for the benefit of the claims in such section for the purpose of removing reef, debris, water, &c., in such manner as the Mining Board shall direct." There is nothing to shew that the Board has not complied with the requirements of this bye-law and expended the rates levied on the section in which the plaintiff's claims are situate on the removal of reef, &c., from those claims; we know in fact that a considerable sum has been paid by the Board to the plaintiff for the removal by him of reef which had fallen from within the mining area and the jurisdiction of the Board. If a heavier rate than was really necessary has been levied under the belief that the Board would have to provide for the reef which in the end proved to be without its jurisdiction and beyond its control, there may, as I have already suggested, be another remedy open to the plaintiff. His present claim seems to be as inadmissible as that raised in the case of *De Beer's Diamond Mining Company vs. Victoria Diamond Mining Company*, that the Board was compellable to remove all the adventitious water which any Company, by adopting a certain method of working, might find it con-

venient to lead into the mine. On these grounds I think that the replication has failed, and that the plea raised by the defendant has been substantiated.

1884.
March 18.
" 20.
" 31.

McFarland vs.
De Beer's
Mining Board.

Judgment for defendant, with costs.

[Plaintiff's Attorney, RHODES.
Defendant's Attorneys, HAARHOFF BROS.]

BERRY vs. NONNE.

Arrest.—9th Rule of Court.—False imprisonment and malicious prosecution.

An objection to a writ of arrest, that it was not endorsed with the address of the plaintiff's attorney, sustained.

N. had been arrested and charged with theft on information sworn by B., a resident in the Free State; and the charge had been dismissed. N. then brought an action against B. for false imprisonment and malicious prosecution, and caused him to be arrested iudicium sisti. An application by B. for the cancellation of the bail-bond was refused.

The applicant, a resident in the Orange Free State, had on the 3rd April, 1884, been arrested at the suit of the respondent to found jurisdiction in an action in which the respondent claimed £1000 for false imprisonment and malicious prosecution. The applicant had found bail for his appearance, and to abide the result of the action, in the sum of £1500. The present application was to set aside the arrest and cancel the bail-bond. Before the affidavits on the merits were read,

1884.
April 10.
Berry vs. Nonne.

Forster, for the applicant, pointed out that the 9th Rule of Court had not been complied with in that the address of the plaintiff's attorney was not endorsed upon the writ: he therefore contended that the writ was bad *ab initio*.

1884.
 April 10.
 ———
 Berry vs. Nonne.

Hopley, for the respondent, urged that this was a technical irregularity, which had been waived and cured by the course the applicant had adopted in giving bail and now appearing.

The COURT held that, though the objection was technical, it was a fatal one, and that if it was insisted on the writ must be set aside.

Forster, wishing to have the matter heard on the merits, then withdrew his preliminary objection, the writ was amended by consent, and the application heard on the merits.

The facts, as set forth on the applicant's affidavit, were briefly as follows. On the 2nd April the applicant, a pound-master at Jacobsdal, in the Orange Free State, drove into Kimberley in a light cart, leaving his wife and family *en route* to the same place in a wagon drawn by six horses. The applicant was informed that a man had stopped the wagon, claimed one of the horses, and caused it to be taken out of the team, and detained it in his yard, whereupon he came back and demanded the horse, alleging that he had bought it at a pound sale. The respondent asked him to prove this statement, and refused to give the horse up. Thereupon applicant went to the Commissioner of Police, who gave him a policeman, with instructions to bring the man and the horse. They went to respondent's place, and a satisfactory explanation and arrangement took place, the respondent giving up the horse and the applicant promising to send a certificate to prove the sale of the horse out of the pound. The parties parted amicably, and the applicant and the policeman returned to the Commissioner of Police, and explained that the matter had been arranged; whereupon the Commissioner ordered that the man and horse should be fetched, saying that he could not allow his policemen to be running about for nothing. He also told the applicant to make an affidavit. The applicant and the policeman thereupon went to the respondent's place of business in applicant's cart, and brought him down to the

police station. On arrival they found that the Commissioner had gone away, and had left word that applicant should make an affidavit, which he did in the following terms :—"I am pound-master of Jacobsdal, in the Orange Free State. I left my wife and a man named Geyer in charge of a wagon and six horses at the racecourse near Kimberley, at about 9 o'clock this morning. At about 11.30 A.M. Geyer came to me and said that some one had stopped my wagon in the middle of the street, and outspanned one horse, and took a rein with the horse. I went to the place, and found my horse in possession of Charles Nonne, of Kimberley. I asked him for my horse, and he refused to give it up. I reported the matter to the police. The horse in question is now in possession of the police." This affidavit he signed, and waited for the return of the Commissioner, who was a J.P., to swear to it. The Commissioner returned, read the document, and inquired what charge he intended to prefer; whereupon he answered, "I don't know; I have given you all the information I am possessed of in my affidavit." The Commissioner said, "It is theft." Applicant replied, "I don't know; I have given you the particulars." The Commissioner said, "Why, what is it but theft? You can't call it anything else." The Commissioner, after conferring with Captain Back, who was present, then caused the following words to be added below applicant's signature: "I now charge the said Charles Nonne with the theft of my horse." The applicant then swore to the affidavit, and a warrant was issued against the respondent.

The respondent made no answering affidavit, but his declaration in the principal action had already been filed, and was before the Court, in which he alleged that the applicant had unlawfully and maliciously and without reasonable and probable cause arrested and imprisoned him, and that he had on the 2nd April been detained in custody on a charge of theft preferred against him by the applicant until he could find bail; and that the applicant had on the 3rd April maliciously and without reasonable or probable cause appeared and prosecuted him on the said charge, which was dismissed. He claimed £1000 damages. The

1884.
April 10.
Berry vs. Nonne.

1884.
April 10.
Berry vs. Nonne.

affidavits of the Commissioner of Police and of Captain Back were produced for the respondent, and stated that the applicant had charged the respondent with theft, and had asked that a warrant should be issued against him.

Forster contended that the arrest should be set aside, as there was no evidence of false imprisonment or malicious prosecution. The applicant had made a plain statement of facts to the Commissioner of Police, and was not responsible for the action taken by him. The Commissioner had forced the applicant to sign the affidavit and make the charge, and there was absolutely no evidence of malice on his part. Writs of arrest should not be issued indiscriminately or on slight grounds, and this was a case where the writ should never have been issued; *Saget vs. Bataillou*, Buch. 1868, 32. The respondent took the law into his own hands in un-harnessing and taking possession of the horse, and he must have known that a prosecution for theft would be the natural result of his act. He had certainly given reasonable cause for the prosecution. Moreover, foreigners should be protected. The applicant was not an unknown stranger, but a well-known resident in a neighbouring State, who could have been sued in his own *forum*. The process of arrest had been abused, and the bail which the applicant had been required to give was very excessive.

Hopley, for the respondent, was not called upon.

JONES, J. :—If this had been an application for a reduction of the amount of the bail-bond, the Court might have seen its way to relieve the applicant; but in the present aspect of the case we are not called upon to consider that point. It is clear that the respondent was arrested and prosecuted, and that the proceedings were instituted by the applicant. The proceedings have terminated in the respondent's favour, and he alleges that the action taken by the applicant was malicious and without reasonable or probable cause, and that he has been seriously damaged in consequence. There is nothing to compel the respondent to sue the applicant in a foreign jurisdiction. If a foreigner chooses to lay himself open to civil proceedings in this jurisdiction he is liable to

arrest *ad fundandam iurisdictionem*. That course has been adopted in the present case, and the Court cannot refuse to confirm the arrest. The application must therefore be refused and the arrest confirmed, with costs.

1884.
April 10.
Berry vs. Nonne.

LAURENCE, J., concurred.

[Applicant's Attorney, BEEVOR.
Respondent's Attorney, RHODES.]

CHAPMAN vs. TRUSTEE OF BRAHAM AND SHILLING.

Delivery of title-deeds of immovable property.—Equitable mortgage.—Preferent creditor.—Plan of distribution.

The mere delivery of title-deeds as security for a debt does not constitute by the law of this Colony an equitable mortgage on the property; and the holder of such security ranks only as a concurrent creditor in insolvency.

This was an application to the Court to order the trustee of the insolvent estate of one Braham to alter the plan of distribution by granting a preference to the applicant upon the proceeds of certain house property which had been sold in the estate. It appeared that Braham had before his insolvency been indebted to the applicant in a certain sum for rent of a property which he had hired from him. Finding himself unable to pay the amount, he handed the title-deeds and keys of another property belonging to himself to the applicant, giving him power to sell or mortgage the said property to satisfy the debt. Before any steps had been taken by the applicant, Braham became insolvent. The trustee of the insolvent estate claimed the title-deeds and the keys, as they were necessary to enable him to effect a sale of the said property. The applicant refused to give them up, alleging that he had a lien on the property, and that his claim was preferent on the proceeds thereof. Eventually, as the applicant alleged, both the trustee and the

1884.
April 10.
Chapman vs.
Trustee of
Braham and
Shilling.

1884.
April 10.
Chapman vs.
Trustee of
Braham and
Shilling.

auctioneer, who had been instructed by the trustee to realise the property, promised him that his claim should be treated as preferent on the proceeds; and on these conditions he gave up the title-deeds and the keys. This agreement was denied by the trustee, but the auctioneer made no affidavit. The property was sold, and the proceeds paid to the holder of a general bond, the other respondent, whose claim was even then only partially satisfied. A subsequent bondholder and the concurrent creditors, among whom the applicant had been ranked by the trustee, received nothing.

Hopley, for the applicant, said that his client rested his claim for preference upon an alleged lien which he claimed to have acquired over the property by virtue of the handing over of the title-deeds to him by his debtor. In England an equitable mortgage would be thus constituted. In the present case applicant had had full power over the property granted to him by the insolvent, either to sell or to mortgage it, but, believing that he had an equitable right of preference on the proceeds of the property by virtue of the possession of the key and title-deeds, he had taken no steps in the matter, and he now wished for a ruling of the Court. He referred the Court to the following cases: *Trustees of Randall vs. Norden*, 2 Menz. 368; *Phillips and King vs. Moore's Trustee*, 2 Menz. 369; *Matthew's Trustee vs. Stewart*, Buch. 1868, 251.

Hoskyns, C.P., for the trustee, and

Forster, for the secured creditor, were not called upon.

JONES, J.:—I am of opinion that the trustee has acted correctly. Not only the cases to which we have been referred, but others subsequently decided, have clearly settled that the mere delivery of the title-deeds of a property gives the receiver no *ius in re* over it. In a case, the name of which I have forgotten, which came before the Court of the Eastern Districts, the point was elaborately argued by the present Chief Justice of the Transvaal, then at the Bar, and it was decided by that Court that our law did not recognise equitable mortgages; an exhaustive judgment on the subject was then delivered by Mr. Justice SMITH. Such a

right as is here claimed by the applicant could in no case entitle him to a preference over the holder of a previously registered bond.

1884.
April 10.
Chapman vs
Trustee of
Braham and
Shilling.

LAURENCE, J., concurred.

Application dismissed, with costs.

[Applicant's Attorney, RHODES.
Respondents' Attorneys, H. C. & J. C. HAARHOFF.]

KEMP vs. KIMBERLEY LICENSING COURT.

Right of Appeal.—Act 28, 1883.—*Charter of Justice.*—
190th Rule of Court.

There is no appeal from a decision of a Licensing Court sitting under Act 28 of 1883. If such Court exercises its powers in an illegal or improper manner, the proper remedy is to apply for the process of the Court under the 190th Rule of Court.

James Kemp, a licensed victualler, applied for a renewal of his licence to the Kimberley Licensing Court at a sitting held on March 6, 1884, under the provisions of Act 28, 1883, which application was refused. Kemp then appealed to the High Court, on the ground of certain alleged irregularities in the proceedings of the Licensing Court in dealing with his case, which were set forth on affidavit. He gave notice of his intention to appeal, and of the grounds of appeal, to the Licensing Court, by serving copies of the documents on the Resident Magistrate in his capacity as Chairman of the Court.

1884.
April 10.
Kemp vs.
Kimberley
Licensing Court.

Davison appeared for Kemp, and there was no appearance on behalf of the Licensing Court.

LAURENCE, J.: Mr. *Davison*, are you here as an appellant, or as an applicant?

1884.
April 10.

Kemp vs.
Kimberley
Licensing Court.

Davison :—As appellant.

LAURENCE, J. :—Then where is your right of appeal?

Davison :—No express right is given by the Act, but neither is the right taken away, and it is contended that there is a common-law right of appeal against irregular proceedings by a public body. He referred to the recent judgment of BUCHANAN, J.P., in *L. and S. A. Exploration Company vs. Kimberley Town Council*, where, referring to the Kimberley Municipality Ordinance, his Lordship was reported to have said :—“ I can find no other colonial Municipal Ordinance in which *what is with justice regarded as one of the first rights of the subject, a fair right of appeal against alleged wrong*, is taken away or restricted.”

JONES, J. :—I don't know whether those were the exact words used by the Judge President, but he was probably referring to the general right of review under clause 32 of the Charter of Justice, which is, technically, quite a different remedy to that of appeal.

LAURENCE, J., referred to *Wilberforce on Statutes*, p. 43 :—“ The same words which are needed to take away the writ of *certiorari* are needed to give an appeal, and no such right can be given by implication, as by a form in the schedule to an Act containing the words ‘ unless upon an appeal against the same to be then made,’ or by reference to other Acts, which allow an appeal ; ” and to the cases there cited.

Davison contended that this appeal was virtually the same thing as a review, under the general power conferred on the Court by the Charter of Justice.

JONES, J. :—It is clear that the wrong course has been adopted, and that this application, in its present form, is one which the Court has no jurisdiction to entertain. The proceedings have been taken by way of appeal where no right of appeal exists, and it is an elementary principle that there can be no appeal to a superior Court unless it has been

specifically given. No doubt the 32nd clause of the Charter of Justice gives a wide power of review over the proceedings of all inferior Courts of Justice; and if a public body, like the Licensing Court, acts improperly, there are extensive powers of redress which this Court can exercise, if the matter is brought before it in the proper way. If application had been made for the process of the Court under and in terms of the 190th Rule of Court, we might have dealt with it; but Mr. Kemp as appellant has no *locus standi*, and we cannot listen to him in that capacity.

1884.
April 10.
Kemp vs.
Kimberley
Licensing Court.

LAURENCE, J., concurred, and the appeal was accordingly dismissed.

[Appellant's Attorneys, KNIGHTS & HEARLE.]

MAGISTRATE'S COURT CASES REVIEWED.

QUEEN *vs.* STEPHENSON.

Act 27, 1882, sect. 10.

In a prosecution under sect. 10 of Act 27, 1882, the charge must allege, and the evidence must clearly disclose, that the language complained of was used in a street, road, public place or licensed public-house.

Where the charge did not contain this allegation, the whole proceedings were quashed.

1884.
Jan. 25.
—
Queen *vs.*
Stephenson.

LAURENCE, J. :—This case has come before me in review from the Assistant Magistrate of the District of Herbert, sitting at Douglas. The accused, who is the gaoler at Douglas, was charged with contravening sect. 10 of Act 27 of 1882; he was convicted and sentenced to pay a fine of £2, or in default fourteen days imprisonment. The offence constituted by this section is that of using threatening or abusive language, &c, “in any street, road, public place, or licensed public-house.” As the charge does not allege that the language in question was used in any such place, it discloses no offence, and I have therefore, though not without regret, been forced to the conclusion that the whole proceedings must be quashed, leaving it open to the Magistrate to proceed *de novo*, if he thinks fit. It may be added that it appears from the evidence that the language complained of was used on two occasions, in the morning and evening of the same day. On the first occasion the expression used to the complainant was, “I should like to have you alone for five minutes,” and this is stated to have been uttered in a threatening manner, such as would be likely to provoke a breach of the peace. Although there is indirect evidence that this expression was used in a public place, even if the

charge had been correctly framed and the evidence had been clear on the point, there might be some doubt whether it was threatening or abusive language or behaviour within the meaning of the Act; as to the language used on the second occasion, it was clearly of an abusive nature, but the evidence shews that the accused at the time was in a baker's tent, and not in any of the places mentioned in the section. I have found it necessary to caution the Assistant Magistrate against taking hearsay evidence—conversations which took place in the absence of the prisoner—such as appears on the present record. I have also directed the attention of the *Crown Prosecutor* to the conduct of the accused, which appears, both from the evidence and the Magistrate's remarks, to have been extremely reprehensible on the part of one occupying a position of public trust.

1884.
Jan. 25.
—
Queen vs.
Stephenson.

QUEEN vs. KLEINBOOI.

Theft.

Where a prisoner was charged with the crime of theft, and the Magistrate found him "guilty of being in possession of stolen property without being able to account for the same," the conviction was quashed.

LAURENCE, J.:—Kleinbooi was charged before the Resident Magistrate of Du Toit's Pan with the crime of stealing money and goods, the property of his master. There was ample evidence of the theft. The prisoner absconded from his master's service, spent money freely, and was apprehended a day or two afterwards with various articles belonging to his master (including a pocket-book which had contained a £5 note) in his possession, while it was further proved that he had disposed of other goods which had been stolen. The Magistrate convicted the prisoner of "being in possession of stolen property without being able to account for the same," and sentenced him to three months' imprisonment with hard labour. I should have thought it was

1884.
Jan. 25.
—
Queen vs.
Kleinbooi.

1884.
Jan. 25.
—
Queen vs.
Kleinboof.

scarcely necessary to point out that on a charge of theft there are only three possible verdicts: (1) "Guilty of theft;" (2) "Guilty of receiving stolen property, well knowing the same to have been stolen;" (3) "Not guilty." The Magistrate has convicted the prisoner of what is not in itself a crime, but merely evidence of a crime, and there is no alternative but to quash the conviction.

QUEEN vs. DRAGOONER.

Act 3, 1861, §§ 25-29.—Act 17, 1867, § 6.—Remitted case.—Right of prisoner to call fresh evidence.

Where a prisoner was committed for trial for stock theft, and the Crown Prosecutor remitted the case to the Magistrate under Act 3, 1861, § 29, and Act 17, 1867, § 6, and the Magistrate refused the prisoner's request to call fresh evidence which might have proved material, the conviction was quashed.

1884.
Feb. 19.
—
Queen vs.
Dragooner.

LAURENCE, J.:—This case has come before me in review from the Resident Magistrate of Hay. The prisoner, a herd, was charged, under Act 17 of 1867, with stealing certain sheep, the property of his master; a preparatory examination was taken, the prisoner was committed for trial, and the *Crown Prosecutor* remitted the case, under sect. 6 of the above Act, to the Magistrate, who convicted the prisoner and sentenced him to twelve months' imprisonment with hard labour. The case for the Crown was that the prisoner's master, in whom the property was laid, had sent the prisoner in charge of the sheep to deliver them to one Theron, who had purchased them; the prisoner's defence was that he was to take the sheep to Theron on approval, and, if he declined to buy, to exchange them for goats, which he was to keep for his master, and that, on Theron declining to accept the sheep, he had carried out his instructions. The evidence for the Crown was by no means satisfactory, and the brother of the prosecutor, who was called as a witness with regard to the

instructions given to the prisoner, to a great extent corroborated the defence and contradicted the evidence of the prosecutor himself. On the whole evidence I am of opinion that there was room for reasonable doubt of the prisoner's guilt, of which the Magistrate should have given him the benefit. There is however another ground on which it is clear that the conviction must be quashed. On the case being remitted the accused applied for the evidence of Theron to be taken, but the Magistrate refused to adopt this course, holding that his evidence would not be material. It is clear, however, that evidence of the nature of the agreement between Theron and the prosecutor, and of what took place between Theron and the prisoner, might have proved highly material, and the refusal of the prisoner's request was therefore not in accordance with real and substantial justice, and the conviction must on that account be quashed. It is true that provision for the calling of witnesses on behalf of the accused, not previously examined at the preliminary, is expressly made only by sect. 26 of Act 3 of 1861, which deals with cases remitted under Act 12 of 1860, where the accused has voluntarily admitted his guilt; and where he has not done so, and the case is remitted under sect. 6 of Act 12 of 1867, the Magistrate has to follow the provisions, not of sections 25–28, but of sect. 29 of the Act of 1861; but as this section provides that the case “shall be proceeded with in like manner in all respects as if no preparatory examination had been previously taken,” with the exception that, where the Magistrate is the same, it is competent for him to read the depositions already taken in the presence of the accused, it was clearly intended that in these cases the prisoner should have the right of calling further evidence, if he so desired; and it was never contemplated, neither is it the proper construction of the Act, that prisoners who have not admitted their guilt should be placed in a worse position, on their cases being remitted, than those who have.

1884.
Feb. 19.
—
Queen vs.
Dragoonier.

QUEEN vs. BLOEM.

*Charge of theft.—Averment of possession of goods stolen.—
Improper admission of evidence.*

Where a prisoner was charged before a Magistrate with stealing goods “from the store of H. & P.,” and pleaded guilty: Held, on review, that there was a sufficient implication that the goods were in the lawful possession of H. & P.

The Magistrate having improperly admitted certain evidence of which the object was to aggravate the sentence: Held, as it did not appear that the sentence had in fact been aggravated in consequence, or that the punishment was excessive, that the sentence must be upheld.

1884.
March 17.
—
Queen vs.
Bloem.

LAURENCE, J.:—This case has come before me in review from the Assistant Magistrate of Barkly West, before whom the prisoner was charged with stealing certain goods from the store of Messrs. Hill & Paddon. He pleaded guilty, and was convicted and sentenced to three months' imprisonment with hard labour. There was no direct allegation in the charge as to the property or possession of the articles stolen, but as there may fairly be said to be a presumption that goods stolen from a store are in the lawful possession of the owners of the store, and as the prisoner pleaded guilty and the evidence was clear, the technical imperfection in the framing of the charge does not appear to justify or require the quashing of the conviction. I have moreover to observe on this case that the Magistrate committed a further error in improperly admitting and recording evidence before giving judgment, of which the object can only have been to aggravate the sentence, a witness being allowed to express his hope that the Court would “make an example” of the prisoner, as petty thefts of a similar nature were frequently committed and were difficult to detect. As, however, it does not appear that the Magistrate was influenced by this evidence in the sentence he imposed, or that the punishment was excessive for a theft which, although petty, was committed by a servant, I do not think it necessary to interfere with the sentence on the

ground of improper admission of evidence ; but in returning the record shall caution the Assistant Magistrate to be on his guard against similar errors of procedure in the future.

1884.
March 17.
—
Queen vs.
Bloem.

QUEEN vs. CHARLIE SHANGAAN.

Malicious injury to property.

Where a prisoner was charged with malicious injury to property, and the Magistrate found him guilty only of "damaging" the property, the conviction was quashed.

JONES, J.:—A case has come before me for review as Judge of the week, in which a prisoner named Charlie Shangaan was tried before the Additional Resident Magistrate at Du Toit's Pan on a charge of malicious injury to property, "in that he wrongfully and unlawfully damaged certain sheets of iron," &c. The evidence shewed that the prisoner did damage the iron, and that he was drunk at the time. The Magistrate found him "guilty of damaging certain sheets of iron," and sentenced him to a period of imprisonment. To damage property gives a good cause of action, but is not in itself a crime. To constitute the crime it is essential that the injury should be malicious ; and as the Magistrate has not found that such was the case, the conviction must be quashed.

1884.
March 31.
—
Queen vs.
Charlie
Shangaan.

QUEEN vs. WILLIAMS.

Theft.—Acquittal on ground of ownership or possession of stolen goods essential to charge.

Where a prisoner pleaded guilty to and was convicted of a charge of theft, and the charge failed to lay the property or possession of the stolen articles in anybody, the conviction was quashed.

LAURENCE, J.:—On April 1 Peter Williams was charged before the Assistant Magistrate of Kimberley with the crime

1884.
April 10.
—
Queen vs.
Williams.

1884.
April 10.
—
Queen vs.
Williams.

of theft, in that he stole one medicine chest, one bunch of keys, and £2 1s. 3*d.* in money. He pleaded guilty, and was sentenced to three months' imprisonment with hard labour. The probability is that these articles had an owner ; but, as the charge does not allege that they belonged to or were in the lawful possession of anybody, there is no alternative but to quash the conviction.

VOL. II.]

[PART III.

REPORTS OF CASES

DECIDED

IN THE HIGH COURT

OF

GRIQUALAND.

REPORTED BY

P. M. LAURENCE, LL.D.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE ;

AND

W. M. HOPLEY, B.A.,

ADVOCATE OF THE SUPREME COURT.

VOL. II.—PART III.

MAY to AUGUST, 1884.

CAPE TOWN:

J. C. JUTA & CO.

1886.

HIGH COURT OF GRIQUALAND.

MAY TO AUGUST, 1884.*

JAMES BUCHANAN [Judge President].

S. T. JONES [First Puisne Judge].

P. M. LAURENCE [Second Puisne Judge].

LEIGH HOSKYNs [Crown Prosecutor.]

* BUCHANAN, J.P., was absent on leave during May and June,
and LAURENCE, J., during July and August.

TABLE OF CASES REPORTED.

	PAGE
Blake <i>vs.</i> Greenberg	541
Burman <i>vs.</i> Wild	489
Chisholm <i>vs.</i> Alderson's Trustee	497
Christie, N.O., <i>vs.</i> Manby	461
Conn, <i>In re</i>	459
Crosbie <i>vs.</i> Kimberley Licensing Court	502
Dixon <i>vs.</i> Kimberley Licensing Court	500
Easter <i>vs.</i> Langer	505
European Diamond Mining Co., Ltd., <i>vs.</i> Mylchreest	464
Fenton <i>vs.</i> Boyle & Co.	575
Goldschmidt & Co. <i>vs.</i> Wallis	550
Hampson & Co. <i>vs.</i> Else	439
Kaufmann <i>vs.</i> Kimberley Licensing Court	531
Keefer and Others <i>vs.</i> Von Rönn	435
Kemp <i>vs.</i> Kimberley Licensing Court	448
London and South African Exploration Co., Ltd., <i>vs.</i> Dutoitspan Mining Board	569
London and South African Exploration Co., Ltd., <i>vs.</i> French and D'Esterre Diamond Mining Co., Ltd., and Registrar of Claims	542
McCraan <i>vs.</i> Kimberley Licensing Court	455
Nonne <i>vs.</i> Berry	480
Parkin <i>vs.</i> Richards and Kennedy, N.O.	539
Queen <i>vs.</i> Gongu	585
———— Griesel	586
———— Jacob	579
———— Jack	587
———— Michell	584
———— Pols	580
———— Richards	581
———— Wolff	512
Quinn <i>vs.</i> Harris	440
Rose Innes Diamond Mining Co., Ltd., <i>vs.</i> Central Diamond Mining Co., Ltd.	554
Ryan <i>vs.</i> Kimberley Licensing Court	490
Sauer <i>vs.</i> Radford and Roper	518
Standard Bank <i>vs.</i> D'Esterre	534
Van Nickerk and Another <i>vs.</i> Pretorius	492

INDEX.

	PAGE
ABANDONMENT OF CLAIMS.—See Act 19, 1883 (1).	
Act 9, 1858, §§ 26–42.—See Crown Lands.	
— 5, 1866–7, § 3.—See Ord. 24, 1847 (2).	
— 17, 1867.—See Theft.	
— 18, 1873, § 7.—A prisoner convicted under sect. 7 of Act 18, 1873, cannot be sentenced to imprisonment with hard labour.	
<i>Queen vs. Jack</i>	587
— 4, 1883, § 35.—The Board of Management of a Hospital is not a “householder” within the meaning of sect. 35 of the Public Health Act, 1883. The Resident Surgeon of a Hospital having been convicted of contravening the said section by failing to report the occurrence of certain cases of infectious disease within the Hospital to the Hospital Board of Management “in their capacity as householders of the said hospital;” <i>Held</i> , on appeal, that both summons and conviction must be quashed.	
<i>Queen vs. Wolff</i>	512
1. — 19, 1883, §§ 65, 66, 78.— <i>Abandonment of Claims.—Mandamus.—Register of Claims.—Owners and lessees of claim ground.</i> —Where the owners of claim property applied for an order on the Registrar of Claims to restore to the Register certain claims which had been abandoned by the lessees during the currency of their lease, the Court refused to make such order on motion. <i>London and South African Exploration Company, Limited, vs. French and D’Esteer Diamond Mining Company, Limited, and Registrar of Claims</i>	542
2. — §§ 43, 51, 78, 81.— <i>Assessment of claim property.—Powers of Mining Board.—Mandamus.</i> —An application for a mandamus to compel a Mining Board to remove from the assessment roll of the mine certain property belonging to the applicants, the owners of the soil, which they alleged had been improperly assessed as “claim property,” was refused, the Court holding that the matters in issue between the parties could not be satisfactorily determined on motion. <i>London and South African Exploration Company, Limited, vs. Dutoitspan Mining Board</i>	569
1. — 28, 1883.—See Licensing Court (1).	
2. —————See Licensing Court (2).	
3. —————See Licensing Court (3).	
4. —————See Licensing Court (4).	
5. —————See Licensing Court (5).	
6. —————See Licensing Court (6).	

7. ACT 28, 1883, §§ 75, 94.—*Payment to informers.*—Where a prisoner has been convicted under sect. 75 of Act 28, 1883, of selling liquor without a licence, it is not competent for the Magistrate under sect. 94 to award payment of portion of the fine imposed to the traps engaged in obtaining the conviction. *Queen vs. Pals* 580
8. —, §§ 81, 82.—*Liability of licensee for acts of agent.*—*Proof of agency.*—*Mens rea.*—An order for the closing of certain licensed premises having been issued by a Magistrate, under sect. 81 of Act 28, 1883, S., a person then serving customers on the premises, disobeyed the order. R., the holder of the licence, in his capacity as trustee of an insolvent estate, was convicted of contravening sect. 82 of the Act. *Held*, on review, that as there was no proof that the order had been served on R., or that S. was his agent, the conviction must be quashed. *Queen vs. Richards* 581
9. — *Kafir beer.*—Where a prisoner was convicted of selling certain intoxicating liquor called “Kafir beer” without a licence, and the evidence was very conflicting as to whether the liquor sold was of an intoxicating nature, the conviction was quashed. *Queen vs. Gonga* 585
- ADJUDICATION, DELAY OF FINAL.—See Insolvency.
- AGENCY, PROOF OF.—See Act 28, 1883 (8).
- AMALGAMATION OF MINING COMPANIES.—*Completion of contract.*—*Powers of Directors.*—*Ultra vires.*—Where two mining companies had agreed to amalgamate upon a certain basis, and had empowered their respective Directors to arrange the details, and the Directors had subsequently entered into certain arrangements which were *ultra vires*, but the amalgamation had been in the main carried out on the original basis, one of the terms of which was that the amalgamated company should pay one of the Companies at a certain rate for its high ground, on the quantity being measured, and an approximate measurement had afterwards been made: *Held*, that, notwithstanding the circumstance that the agreement between the Directors as to certain points had been *ultra vires*, there had been a completed contract with regard to the high ground, and the Company which formerly owned the ground was entitled to recover from the amalgamated Company, which had taken it over, the value of the said ground at the rate originally fixed, and for the quantity ascertained by the subsequent measurement. *Rose Innes Diamond Mining Company, Limited, vs. Central Diamond Mining Company, Limited* 554
- APOLOGY AND TENDER.—See Libel.
- ASSESSMENT OF CROWN LANDS.—See Crown Lands.
- ASSESSMENT OF CLAIM PROPERTY.—See Act 19, 1883 (2).

BREACH OF CONDITION IN BOND.—See Provisional Sentence (1).

C LIE.—See Exception (2).

COLLUSION.—See Sale and Delivery.

COMPLETION OF CONTRACT.—See Amalgamation.

CONTRIBUTORY NEGLIGENCE.—See Neighbouring Claimholders.

1. COSTS.—See Licensing Court (1).

2. ——— See Licensing Court (2).

3. ——— See Malicious Prosecution (2).

4. ——— See Licensing Court (6).

CROWN LANDS, ASSESSMENT OF RATES ON.—*Liability of purchaser.*—

In April 1883 a divisional council had caused a valuation of all the immovable property in the division to be made under the provisions of Act 9, 1858, and a farm then belonging to the Government had been so valued. A Court for hearing objections to the valuations was held in May and no objections were taken, whereupon in June, after due notice, the Council held a meeting and assessed a general rate, which became payable on August 1, 1883. On August 14, 1883, the said farm was sold by the Government, on perpetual quitrent tenure, under the provisions of Act 14, 1878, and the defendant became the purchaser and owner thereof. In an action against him by the Council for the rates on the farm which were payable on August 1, 1883: *Held*, that he was not liable. *Christie, N. O. vs. Manby* 461

EVIDENCE.—*Right of party to contradict his own witness.*—Where a defendant in the Magistrate's Court called a witness to prove a special plea, and the witness distinctly contradicted such plea, the Magistrate ruled that the defendant could not call further evidence in support of his plea, as it would contradict his own witness: *Held*, on appeal, that the Magistrate's ruling was wrong, and that the defendant was entitled to produce any legal evidence in support of his plea, and that the case must accordingly be remitted for the Magistrate to take further evidence. *Hampson & Co. vs. Else* 439

1. EXCEPTION.—*Moneys had and received.*—*Proof on insolvent estate.*—C. claimed to be entitled to prove on the insolvent estate of A. for a sum of money given by him to A. on an agreement that A. should with that and other moneys purchase a certain farm, and hold it in trust for C. and others. A. failed to complete the purchase of the farm, and the amount paid by C. was, as alleged, in consequence wholly lost to him. An exception to C.'s declaration, on the ground that the facts alleged did not entitle him to the relief claimed, was overruled. *Chisholm vs. Alderson's Trustee* 497

2. ——— *Promissory note.*—*Guarantee.*—*Liability of committee-man for goods supplied to Club.*—The trustees of a club made certain promissory notes for goods supplied to the club. The plaintiff, as holder for value of the said notes, sued the defendant, a member of the Managing Committee of the Club, for the amount due on the notes, alleging that they were made by the trustees in behalf and under the authority of the Committee,

and for goods sold and delivered to the Committee, and that the trustees promised, on behalf of the Committee, to pay the amounts of the notes to the lawful holder at maturity. *Held*, on exception, that the declaration disclosed no cause of action against the defendant. *Standard Bank of South Africa vs. D'Esterre* 534

1. EXECUTOR DATIVE.—See Ordinance 104, 1833 (1).

2. — See Ordinance 104 (2).

EXECUTOR, REMOVAL OF.—See Ordinance 104, 1833 (1).

FALSE IMPRISONMENT.—*Malicious prosecution*.—*Pound-law of Orange Free State*.—N. lost a horse, which was impounded in the Orange Free State, and, contrary to the law of that country, indirectly purchased by the pound-master, B. B. brought the horse to Kimberley, where it was seized by N. After explanations between them, N. allowed B. to take away the horse on certain conditions. B. however subsequently charged N. with the theft of the horse. N. was arrested and tried by the Magistrate, B. giving evidence for the prosecution, and the Magistrate dismissed the charge. *Held*, that, the original arrest having been without warrant, and the proceedings without reasonable and probable cause, N. was entitled to substantial damages for false imprisonment and malicious prosecution.

Nonne vs. Berry 480

FALSE PRETENCES.—See Theft.

FRAUD.—See Sale and Delivery.

GAOL REGULATIONS.—See Ordinance 24, 1847 (1).

GUARANTEE.—See Exception (2).

HUSBAND AND WIFE.—See Sale and Delivery.

INFORMERS, PAYMENT TO.—See Act 28, 1883 (7).

INSOLVENCY.—*Delay of final adjudication*.—*Rule of Court* 148.—*Ord. 6, 1843, §§ 4, 5, 18*.—K. had committed an act of insolvency by not satisfying a writ issued upon a judgment debt, and his estate had been provisionally sequestrated on the petition of the judgment creditor. Upon the return day, K. applied for a suspension of the final order, pending the result of an appeal from a judgment of the High Court, by which property belonging to him had been rendered undisposible. He alleged that but for the judgment under appeal he would have had ample property to satisfy the claim, and that he would be able to do so if the Court of Appeal were to decide in his favour; but he failed to shew to the Court that he would not be insolvent, even if the result he hoped for were to take place. *Held*, that no sufficient cause for delaying the adjudication had been shewn, and the estate was sequestrated accordingly. *Held also*, that

upon such application by the insolvent, any persons interested in the estate might appear to support the application without notice to the petitioning creditor. *Keefer and Others vs. Von Rönn* 435

INTERPLEADER.—See Sale and Delivery.

KAFIR BEER.—See Act 28, 1883 (9).

LIABILITY OF CHAIRMAN OF MINING BOARD.—See Provisional Sentence (2).

LIABILITY OF COMMITTEE-MAN FOR GOODS SUPPLIED TO CLUB.—See Exception (2).

LIABILITY OF LICENCEE FOR ACTS OF AGENT.—See Act 28, 1883 (8).

LIABILITY FOR COST OF HAULING FALLEN GROUND.—See Neighbouring Claimholders.

LIABILITY FOR RATES OF PURCHASER OF CROWN LANDS.—See Crown Lands.

LIBEL.—*Apology and tender.*—*Measure of Damages.*—Where a newspaper had published the report of a speech, containing libellous reflections on the professional conduct of the plaintiff, a medical man, and the publishers had subsequently published an apology, and tendered the sum of £20 as damages for the publication, and there was no proof of express malice, or of special damage suffered by the plaintiff: *Held*, that the amount tendered, together with the apology, was sufficient, and that the plaintiff must have judgment for that amount, but must pay all costs incurred subsequent to the tender. *Sauer vs. Radford and Roper* 518

1. LICENSING COURT.—*Rule of Court 190.*—*Act 28, 1883.*—*Irregularity of procedure.*—*Review.*—*Costs.*—K. had, in 1881, obtained a licence to sell wines, &c., in premises which he then purchased, and which had been licensed since 1874. In March, 1884, he applied to the Licensing Court for a renewal of his licence. The record of the proceedings merely shewed that the application had been refused upon a “statement” by an inspector of police that the applicant had been convicted of a sale after licensed hours, and that sworn information was lying at the Magistrate’s office on a similar charge. There being nothing on the record to shew that evidence on oath was taken, or that any objection to the renewal was made, or that any notice of objection had been given to the applicant, or that time had been given to him to meet the objection, the Court, on the petition of K., granted issue of process under the provisions of Rule 190. A summons was accordingly issued calling on the members of the Licensing Court to shew cause why their proceedings should not be set aside or corrected, and why the licence should not be renewed, and why they should not pay costs. The summons set forth the above irregularities and others. On the return day the respondents made no appearance, and the Court,

- after argument by the applicant's counsel, ordered that the proceedings should be set aside, that the Distributor of Stamps should issue a licence similar to the one previously held by the applicant, and that the members of the Licensing Court should pay the costs. *Kemp vs. Kimberley Licensing Court* 448
2. LICENSING COURT.—*Rule of Court* 190.—*Act* 28, 1883.—*Costs*.—Where an applicant was entitled to a certificate of renewal of his licence, under sect. 50 of *Act* 28, 1883, and the Licensing Court required him to transfer his licence on the ground that the situation of his premises was unsuitable, and the applicant thereupon obtained new premises, to which no objection was taken, and the Licensing Court then refused to renew his licence: *Held*, that the proceedings of the Court must be set aside, and a licence issued to the applicant for the new premises, and that, the action of the respondents having been illegal and *ultra vires*, they must pay the costs of the application. *McCrann vs. Kimberley Licensing Court* 455
3. — *Rule of Court* 190.—*Act* 28, 1883.—Where objections were taken by a member of a Licensing Court to the renewal of the licence of an applicant, who was entitled to apply for a certificate of renewal under sect. 50 of *Act* 28, 1883, and an adjournment was granted, and at the resumed hearing evidence was adduced on oath, and the licence was then refused, the Court refused an application for process under *Rule of Court* 190, holding that the petition disclosed no grounds for setting aside or correcting the proceedings. *Ryan vs. Kimberley Licensing Court* 490
4. — *Act* 28, 1883.—In the absence of clear proof of irregularity or *mala fides*, the Court will not interfere with the discretion of a Licensing Court in refusing an application for a licence under *Act* 28, 1883. *Dixon vs. Kimberley Licensing Court* 500
5. — *Act* 28, 1883.—The Court will not review the decision of a Licensing Court which has varied the conditions under which a licence was renewed. "Conditions" in sect. 50 of *Act* 28, 1883, includes the "privileges" mentioned in sect. 39. *Crosbie vs. Kimberley Licensing Court* 502
6. — *Rule of Court* 190.—*Review*.—*Act* 28, 1883.—*Costs*.—F. K. had for five years been licensed to sell liquors on premises which had been licensed for eight years. He became ill, and was obliged to go to Europe for his health, leaving his general power of attorney with his brother J. K., who managed the business until the expiration of the existing licence, and then applied for a renewal in his own name. At the hearing of the application by the Licensing Court, a police officer stated that the place was improperly conducted, and another police officer stated that the accommodation was insufficient. J. K. applied that these statements should be made on oath, but his request was refused. He

had no notice of any objections, and it did not appear on the record that any objection was taken. He had no opportunity of replying to or of calling evidence to contradict the statements by the police officers, which it was alleged were unfounded. On a petition setting forth these facts, the Court granted issue of process in terms of Rule 190. Summons was issued, alleging the above irregularities, and served on the members of the Licensing Court, and on the return day the respondents made no appearance, and there was no contradiction of the allegations made by the applicant. The Court ordered that the Distributor of Stamps should issue a licence to J. K., similar to the one previously enjoyed for the premises, and ordered the members of the Licensing Court to pay the costs of the application.

Kaufmann vs. Kimberley Licensing Court 531

1. MALICIOUS PROSECUTION.—See False Imprisonment.

2. — *Reasonable and probable cause.*—*Costs.*—Where a Magistrate had given judgment in favour of a plaintiff in an action for malicious prosecution on the ground that the defendant had instituted criminal proceedings without sufficient reason, but it did not appear that there had been an entire absence of reasonable and probable cause, or that the defendant had been actuated by malice, the Court, on appeal, changed the judgment into one of absolution from the instance, but, having regard to the fact that the conduct of both parties was open to censure, made no order as to costs. *Easter vs. Langer* 505

1. MANDAMUS.—See Act 19, 1883 (1).

2. — See Act 19, 1883 (2).

MEASURE OF DAMAGES.—See Libel.

MEDICAL CHARGES, RECOVERY OF.—*Ordinance 82 of 1830.*—A medical man licensed to practise in this Colony only as a surgeon and accoucheur is not entitled to recover fees for services rendered as a physician. *Quinn vs. Harris* 440

MENS REA.—See Act 28, 1883 (8).

1. MINING BOARD.—See Provisional Sentence (2).

2. — See Act 19, 1883 (2).

MONEYS HAD AND RECEIVED.—See Exception (1).

MORTGAGE BOND.—See Provisional Sentence (1).

NEIGHBOURING CLAIMHOLDERS.—*Liability for cost of hauling fallen ground.*—*Contributory negligence.*—The purchaser of dangerous claim-property is bound to use reasonable care and expedition in making it safe. Where one claimholder sued for the cost of hauling ground, alleged to have been brought down from the claims of another by the careless and dangerous blasting of the upper claimholder, and contributory negligence on the part of the plaintiff was alleged, but not clearly proved, the defendant was held liable for the expense incurred. If one claimholder has to undertake the hauling of ground for the expense of

which another is responsible, and invites the latter to check his tally of the number of loads hauled, and the responsible claimholder neglects to do so, he will be held liable for the quantity hauled according to the tally kept, in the absence of proof that such tally is incorrect. *European Diamond Mining Company, Limited, vs. Mylchreest* 464

ORDINANCE 82 of 1830.—See Medical charges.

1. ORDINANCE 104 of 1833, § 21.—*Executor dative.*—*Removal of executor.*—Where C. had died leaving a will but making no appointment of executors thereto and the Master had thereupon advertised and appointed M. and F. executors dative as if to an intestacy, and F. was alleged to have subsequently absconded from the country with a large portion of the assets; upon the application of M. that the appointment of executors dative should be set aside as null and void *ab initio* on the ground that the Master had acted *ultra vires* in treating the estate as an intestacy: *Held*, that notice of the application to remove him must if possible be served on F. *In re Conn* 459
2. — §§ 21, 22.—*Executor dative.*—*Review of Master's appointment.*—Where the Master in the absence of competition had appointed a person, who did not fall within the classes of persons mentioned in sect. 22 of Ordinance 104, as executor dative of an intestate estate, and a creditor, who stated that he held powers from the other creditors, and had been prevented by a *bonâ fide* mistake from attending the meeting, subsequently applied to have the appointment set aside and himself substituted as executor, and the Master supported the original appointment; the Court declined to interfere with the discretion of the Master, and refused the application. *Parkin vs. Richards and Kennedy, N. O.* 539

ORDINANCE 6, 1843, §§ 4, 5, 18.—See Insolvency.

1. ORDINANCE 24, 1847, §§ 1, 10.—*Gaol Regulations.*—A prisoner who has committed an assault on a convict guard should be charged with contravening sect. 10 of Ord. 24 of 1847. Before such prisoner can be sentenced to lashes it is necessary to prove that he was undergoing a hard labour sentence at the time of the offence. *Queen vs. Jacob* 579
2. — §§ 10, 12.—Act 5, 1866–7, § 3.—Ordinance 5, 1876, G. W., § 13.—An unconvicted prisoner cannot be sentenced to lashes for attempting to escape from gaol. *Queen vs. Michell* .. 584

ORDINANCE 5, 1876, G. W., § 13.—See Ordinance 24, 1847 (2).

ORNAMENTAL TIMBER.—See Trespass.

OWNERS AND LESSEES OF CLAIM GROUND.—See Act 19, 1883 (1).

PLEADING.—*Practice.*—*Rules of Court* 21, 26, 27.—Where a plaintiff has been duly barred from replying to the defendant's pleas, he is not entitled to make application that certain of the pleas should be struck out. *Blake vs. Greenberg* 541

POUND LAW OF ORANGE FREE STATE.—See False Imprisonment.

POWERS OF DIRECTORS.—See Amalgamation.

PRACTICE.—See Pleading.

1. PROMISSORY NOTE.—See Exception (2).

2. ——— See Provisional Sentence (2).

PROOF ON INSOLVENT ESTATE.—See Exception (1).

1. PROVISIONAL SENTENCE.—*Mortgage bond*.—*Breach of Condition*.

—*Summons*.—Where by the terms of the conditions of a mortgage bond it appeared that at the date of summons £120 should have been paid in twelve monthly instalments of £10 each, failing the payment of any one of which the whole debt and interest should become due without notice, and the summons did not directly allege the breach of any condition, but stated that £60 had been paid on account: *Held*, that a breach was alleged by implication, and provisional sentence granted. *Burman vs. Wild* 489

2. ——— *Promissory note*.—*Liability of Chairman of Mining Board*.—Where the Chairman of a Mining Board was sued personally on promissory notes made by him “in his capacity of Chairman,” and signed with the words “Chairman to the Board” beneath the signature, the Court refused to grant provisional sentence. *Goldschmidt & Co. vs. Wallis* 550

REASONABLE AND PROBABLE CAUSE.—See Malicious Prosecution (2).

REGISTER OF CLAIMS.—See Act 19, 1883 (1).

REVIEW.—See Licensing Court.

REVIEW OF MASTER'S APPOINTMENT.—See Ordinance 104 (2).

RULES OF COURT 21, 26, 27.—See Pleading.

——— 148.—See Insolvency.

1. ——— 190.—See Licensing Court (1).

2. ——— See Licensing Court (2).

3. ——— See Licensing Court (3).

4. ——— See Licensing Court (6).

SALE AND DELIVERY.—*Collusion*.—*Fraud*.—*Husband and Wife*.—

Interpleader.—Where a debtor against whom two judgments had been obtained, and under one of them a writ of attachment placed upon certain movable property, entered into a deed of sale with another creditor of all his movable property, and the creditor received the keys of the premises, and thereupon handed them to the debtor's wife, and placed her in possession as manageress at a salary, for the purpose of carrying on the business in the same manner as before: *Held*, on appeal, that there had been no genuine delivery by the debtor to the creditor, and that the transaction, as against a subsequent attachment by a judgment creditor, must be set aside as fraudulent. *Fenton vs. Boyle & Co.* 575

SEQUESTRATION.—See Insolvency.

SUMMONS.—See Provisional Sentence (1).

	PAGE
THEFT.— <i>False Pretences</i> .—Act 17, 1867.—Where a prisoner was convicted of stock-theft, and the evidence went to shew that he had released certain cattle, the property of his master, from a pound, by falsely representing that a certain heifer, which he left as security for the pound-money, was also his master's property: <i>Held</i> , on review, that the prisoner's conduct did not amount to a theft of the heifer. <i>Queen vs. Griesel</i> 586	586
TRESPASS.— <i>Ornamental timber</i> .—Where one farmer had accidentally trespassed on the farm of another, and cut down two large and valuable trees: <i>Held</i> , that the owner was entitled to substantial damages for the loss of the trees, regarded as ornamental timber. <i>Van Niekerk and Gertenbach vs. Pretorius</i> 492	492
ULTRA VIRES.—See Amalgamation.	

CASES DECIDED

IN THE

HIGH COURT OF GRIQUALAND.

VOL. II.—PART III.

KEEFER AND OTHERS *vs.* VON RÖNN.

Insolvency.—Delay of final adjudication.—Rule of Court 148.
—Ord. 6. 1843, §§ 4, 5, 18.

K. had committed an act of insolvency by not satisfying a writ issued upon a judgment debt, and his estate had been provisionally sequestrated on the petition of the judgment creditor. Upon the return day, K. applied for a suspension of the final order, pending the result of an appeal from a judgment of the High Court, by which property belonging to him had been rendered undisposable. He alleged that but for the judgment under appeal he would have had ample property to satisfy the claim, and that he would be able to do so if the Court of Appeal were to decide in his favour; but he failed to shew to the Court that he would not be insolvent even if the result he hoped for were to take place. Held, that no sufficient cause for delaying the adjudication had been shewn, and the estate must be sequestrated accordingly. Held also, that upon such application by the insolvent any persons interested in the estate might appear to support the application without notice to the petitioning creditor.

The estate of Louis Keefer had been on April 10, 1884, provisionally sequestrated upon the petition of the respondent, and the summons to shew cause against the final adjudication was made returnable on May 1, on which day

1884,
May 1,
Keefer and
Others
vs.
Von Rønn.

1884.
May 1.
Keefer and
Others vs.
Von Rönn.

Hoskyns, C. P., for Keefer, applied that the order should be suspended pending the result of an appeal from a judgment of the High Court.

Lord, Q.C., appeared for sundry creditors to the amount of over £1300, to support the present application.

Forster, for the petitioning creditor, the respondent, objected to *Lord's* appearance, there having been no notice to the respondent, and quoted Rule of Court 148.

Lord, Q.C., referred to *Meyring vs. Black and Another*, 3 Menz. 300.

The objection was overruled.

It appeared from the affidavits that Keefer had in 1880 become insolvent, and that George Richards had been appointed trustee of his estate ; that on February 28, 1881, Keefer had been rehabilitated, after arranging to pay all his creditors in full, which he had since done by means of moneys borrowed, on the security of certain immovable property which had formed portion of the assets of his estate, from the Board of Executors, of which Richards was the secretary. In February, 1883, Keefer instituted an action against the Board of Executors to compel cancellation of the mortgage bond passed in their favour, tendering to pay them the balance of his indebtedness to them. The Board professed not to be able to give up the titles to the properties which they held as security, alleging that they were in possession of George Richards in his capacity of trustee of the insolvent estate, in which capacity he claimed a lien on them for certain interest due to the creditors (who had only received the principal) and for the commission due to himself as trustee. At the trial of the action, the trustee was ordered to intervene, and the Court finally gave judgment for Keefer, with costs against the Board of Executors, but ordered that, before the titles to the property were delivered up to Keefer, he should find security to the amount of £1000 to satisfy the trustee's claim, if it should be found that it was a valid one. Against this latter part of the judgment Keefer lodged an appeal, which could not be heard until the end of June. Keefer alleged that, owing to the part of the judgment against which he had appealed, he had been unable to obtain the loan of the money for which

he had arranged and with which he would have released his title-deeds. He asserted that had it not been for that order he would have been able to satisfy the respondent's claim, and thus would not have committed an act of insolvency, and that if the Court of Appeal were to reverse the order he could at any time thereafter satisfy the claim. The creditors who supported the application asserted on affidavit that it was not to the interest of the concurrent creditors that the applicant should be forced into insolvency, but that a delay till after the sitting of the Court of Appeal would be beneficial to them.

Hoskyns, C. P., argued that, if the order of this Court in this case should be reversed, the applicant's estate would not be insolvent. The judgment was appealable, and the applicant had lodged a genuine appeal. With all deference to this Court it was very doubtful whether that portion of the judgment to which the applicant objected would not be reversed on appeal, and it was only equitable to grant this short delay. [*Lord, Q.C.*, referred to section 18 of the Insolvent Ordinance, which gives the Court power to delay the adjudication for any reasonable time at its discretion.] According to *Simpson & Co. vs. Fleck*, 3 Menz. 213, it is for the defendant to prove that his assets are sufficient to meet his liabilities, and here Keefer alleges that if the judgment were altered on appeal he would be in a position to satisfy the claim. The application was only for a postponement for a reasonable time, during which no deterioration in the value of the property, which consisted wholly of immovables, was likely. Had this property not been "tied up" pending the finding of security, Keefer would have had disposable property amply sufficient to satisfy the sheriff, as required by section 4 of the Insolvent Ordinance.

Lord, Q.C., followed in support of the application and said that this was an exceptional case and not a matter of precedent. The property though not immediately disposable might soon become so. The position was remarkable, a large body of creditors opposing the adjudication. If it were shewn that no benefit to the majority of creditors would result the Court would not order the sequestration of the estate; *in re Stenekamp*, Buch., 1875, 44. In this

1884
May 1.
Keefer and
Others vs.
Von Rönn.

1884.
May 1.
Keefer and
Others vs.
Von Rönn.

instance there could be no possible hardship to the petitioning creditor by granting a short delay. Insolvency is for the benefit of the estate generally, and the Court ought to be satisfied that its order would have that result; moreover the power to delay the order was expressly given by section 18. If the Court of Appeal were to reverse the order of this Court, the creditors would again assist Keefer and his insolvency would be avoided.

Forster, contra, argued that, while the Court under section 18 had the power to grant a reasonable delay, it was only "upon sufficient cause being shewn." A suspension would be granted where a short delay would prevent insolvency but not otherwise. Even assuming that the Court of Appeal decided in Keefer's favour, his estate would be hopelessly insolvent. There were, as appeared from the affidavits, undisputed claims against the estate for over £6,000, and a claim which was disputed for £1,000, and in any case the property would not be nearly sufficient to satisfy the undisputed claims. Meanwhile, as appeared from Keefer's own affidavits, he was instituting actions and wasting what assets he had in ruinous litigation.

JONES, J., said that all parties interested had a right to object to the adjudication or to ask for a suspension of the order upon sufficient cause shewn. The question here was whether sufficient cause had been shewn; and even assuming that Keefer would succeed in the Court of Appeal, he had failed to shew that he would then be able to meet his liabilities. As no ground for further delay had been shewn to the satisfaction of the Court, an order would be made finally adjudicating the estate insolvent, with costs.

LAURENCE, J., concurred.

[Attorneys for Keefer and the Objecting Creditors, PALEY & COGILAN.]
[Attorneys for Von Rönn, GRAHAM & GILBERT.]

HAMPSON & CO. *vs.* ELSE.

Evidence.—Right of party to a suit to contradict his own witness.

Where a defendant in the Magistrate's Court called a witness to prove a special plea, and the witness distinctly contradicted such plea, the Magistrate ruled that the defendant could not call further evidence in support of his plea, as it would contradict his own witness.

Held, on appeal, that the Magistrate's ruling was wrong, and that the defendant was entitled to produce any legal evidence in support of his plea, and that the case must accordingly be remitted for the Magistrate to take further evidence.

This was an appeal from a judgment of the Resident Magistrate of Kimberley. The action in the Court below was brought for £42 3s. 6d. for work and labour performed and materials supplied by the plaintiff, now respondent, for and on behalf of the defendants, now appellants. The defendants pleaded a set-off as to portion of the account and a tender before action of the balance. The defendants having admitted the correctness of the account sued upon the plaintiff closed his case, admitting the tender pleaded. The defendants thereupon called the plaintiff as their witness to prove their plea of set-off. The plaintiff admitted that before he did the work and supplied the materials for which he now sued he had been a debtor of the defendants' firm, and that he had then compounded with the defendants and his other creditors for 7s. 6d. in the pound, in discharge of his debts, and that he after this did the work, &c., now sued for; but he denied that when he undertook the work he agreed with the defendants that they might set-off the amount still due, after the payment of the composition, against the amount earned by him. The defendants thereupon called Mr. B. Hampson, one of the firm, who stated:—
 "After the deed of composition was signed, I made arrangements with the plaintiff to do this work upon the condition that the amount to his debit should be deducted from the

1884.
May 1

Hampson & Co.
vs. Else.

1884.
May 1.
Hampson & Co.
vs. Else.

account.” The plaintiff objected to this evidence on the ground that it was incompetent for the defendants to contradict the evidence of a previous witness called by them. The Court sustained the objection and excluded the evidence. The defendants, in the circumstances, closed their case and judgment was given for the plaintiff with costs. The defendants appealed.

Hoskyns, C.P., for the appellants, urged that the Magistrate had improperly excluded the evidence tended.

Forster, contra, argued that the defendants were not entitled to call evidence to contradict their own witness.

The COURT allowed the appeal, and remitted the case to the Magistrate to take the evidence excluded, together with any other legal evidence offered by the defendants, and ordered the respondent to pay the costs of this appeal, all other costs to abide the Magistrate’s decision.

[Appellants’ attorneys, PALEY & COGHEAN.
Respondent’s attorneys, H. C. & J. C. HAARHOFF.]

QUINN vs. HARRIS.

Ordinance 82 of 1830.—Recovery of Medical Charges.

A medical man licensed to practise in this Colony only as a surgeon and accoucheur is not entitled to recover fees for services rendered as a physician.

1884.
May 1.
“ 2.
“ 8.
Quinn vs.
Harris.

The respondent had sued the appellant in the Court of the Assistant Resident Magistrate at Dutoitspan for the recovery of certain fees for services rendered by him as a medical man to the defendant and his wife. The plea was non-indebtedness. The plaintiff proved the services and that the defendant had, since receiving the account now sued upon, frequently promised to pay, that he had lately offered to settle by weekly payments of five shillings, and that he

had never until very recently repudiated his liability. The plaintiff admitted that he was licensed to practise in this Colony as a surgeon and accoucheur only, and not as a physician. He was a Licentiate of the Royal College of Surgeons, Edinburgh. For the defence a medical man was called, who deposed that the diploma held by the plaintiff did not entitle him to recover fees. The Magistrate gave judgment for the plaintiff as prayed. The defendant appealed.

1884.
May 1.
" 2.
" 8.
Quinn vs.
Harris.

Lange, for the appellant, contended that the respondent, being licensed to practise only as a surgeon and accoucheur, was not entitled to practise as a physician. The law of the Colony drew a distinction between the various branches of the medical profession; Ordinance 82, 1830, ss. 3 and 5; Act 6, 1861, s. 5. He relied upon the case of *Leman vs. Fletcher*, L. R., 8 Q.B., 319, which decided that in England a surgeon cannot recover charges for attendance as a physician unless he be a licentiate of the Society of Apothecaries. He also referred to *Fisher's Dig.* col. 5791. The only colonial case he had been able to find where fees had been recovered by a medical man was *Fleck vs. Moller*, Buch. 1868, 118, where the question as to the plaintiff's qualification was not raised. Here the plaintiff failed to shew that he was acting as a surgeon or accoucheur. [LAURENCE, J.: The plaintiff did certain work and labour, and the defendant promised to pay; is not that sufficient to entitle the plaintiff to recover?] Under Ordinance 82 of 1830 the plaintiff has rendered himself liable to a penalty for practising as a physician when not licensed to do so. He also referred to *Allison vs. Haydon*, 4 Bing. 619.

Forster, for the respondent, pointed out that the defence in the Court below had rested on the evidence of the medical witness, who was wrong, as the English Medical Act, 21 & 22 Vict. c. 90, did recognise the degree of Licentiate of the College of Surgeons, so that fees could be recovered thereunder. *Leman vs. Fletcher* referred to "diseases requiring surgical treatment," "complaints within the province of a surgeon," &c, and it was for the defendant to shew that the plaintiff was not on these grounds entitled

1884.
May 1.
" 2.
" 8.
—
Quinn vs.
Harris.

to recover. Here there was no evidence that the plaintiff had attended as a physician. In England, by section 31 of 21 & 22 Vict. cap. 90, physicians and surgeons can only recover under their respective diplomas. The Colonial Medical Ordinance is silent on this point, and it creates penalties but no disabilities. It does not mean that a physician practising as a surgeon or *vice versâ* should be fined. The Magistrate's judgment should be upheld on the admission of the debt by the appellant; he referred to the remarks of BELL, J., in *Fleck vs. Moller*.

Lange, in reply, referred to *Addison on Contracts*, 216, "on contracts for prohibited services." There is no difference in law between *mala prohibita* and *mala in se*; *Bensley vs. Bignold*, 5 B. & Ald., 340, 341.

Cur. adv. vult.

Postea (May 8), the following judgments were delivered :

JONES, J.:—In this case the respondent, Mr. F. Rutherford Harris, sued the appellant, Nicholas Quinn, in the Court of the Assistant Resident Magistrate for Kimberley at Dutoitspan, for the sum of £6 6s. for "professional aid, advice, and visits as medical practitioner rendered to the wife of the defendant at the special instance and request of the defendant, as set forth in an account annexed to the summons." The plea of the defendant was "non-indebtedness." The plaintiff, during the course of the trial below, admitted that he was merely licensed to practise in this Colony as a "surgeon and accoucheur;" and this would appear to be so from the *Gazette* which, by consent of parties, was put in during the hearing of the case on appeal. Before the summons was issued the plaintiff swears that he sent in his account on several occasions, and the defendant promised to pay the amount, and until lately did not dispute his liability to do so. The plaintiff further says that the medicines supplied or prescribed were not necessitated by any surgical operation, but he had frequently to make night visits and pay cab hire, and as the patient could not sleep he had to give her injections of morphia several times. He does not state the nature of the complaint.

The appellant now contends that, as Mr. Harris has only been gazetted and licensed to practise in this Colony as a "surgeon and accoucheur," he is not entitled to charge at all for any aid and advice rendered to the patient which did not fall within his department as such "surgeon and accoucheur." Mr. *Lange* contends that as the plaintiff was not entitled to practise as a physician he cannot charge for any assistance or medical aid which would fall only within the functions of this particular branch of the medical profession. In this Colony, by Ordinance 82 of 1830, "the Colonial Medical Committee" was created, and certain powers conferred and duties imposed upon it. By section 3 of this Ordinance it is enacted that "no person shall practise as physician, surgeon, accoucheur, apothecary, chemist, or druggist in this Colony without taking out a licence to that effect from the Governor or other person administering the Government as aforesaid, and previously to obtaining such licence any person wishing to practise as aforesaid shall submit his diploma or other certificate of his being duly qualified to practise such branch or branches of the medical profession as he shall profess to exercise for the examination and approval of the said Committee." It will be seen at once that the Ordinance draws a distinction between the physician, the surgeon, accoucheur, etc. By the 5th section of the Ordinance "any person who shall practise any of the aforesaid branches of the medical profession without such licence as aforesaid shall, on conviction, be liable to a penalty of £50 for each offence." Act 6 of 1861, section 5, "The Prescription Amendment Act" places a limit as to the period during and within which "persons practising any branch of the medical profession" may sue for their fees, and impliedly recognises the power of persons duly licensed to sue for fees. To this extent only can it be said that the case of *Fleck vs. Moller* goes (Buch. 1868, p. 118). The particular qualification of the plaintiff, Dr. Fleck, in that case was not in dispute, nor did the reporter state precisely what that qualification was, or in what manner or form he had been licensed by the Governor. In the action brought in the Oudtshoorn Circuit Court, and alluded to by myself (*Hansell vs. Barry's Executor*), the particular question now before the Court was

1854.
May 1.
" 2.
" 8.
Quinn vs.
Harris.

1884.
May 1.
" 2.
" 8.
Quinn vs.
Harris.

not raised. In *Drew vs. Executors of Wolfe* (decided 10th Feb. 1858, and cited in Buch. 1868, p. 119), the point is not touched. On referring to the Gazettes, which were laid before the Court, we find that the Governor in licensing members of the medical profession draws a distinction between the physician and surgeon, no doubt based upon the advice of the medical committee, who have seen the diplomas of the applicants. Some persons are licensed as physicians and surgeons, while others are licensed merely to practise in the latter capacity. The plaintiff in the case before us was the possessor of the Edinburgh qualification of Licentiate of Surgery, and the Governor has licensed him to practise as surgeon and accoucheur only. Under these circumstances the question to be decided is,—can he now sue for fees, unless he shews that the services rendered were services which he was entitled to perform in his capacity as a practising surgeon? He could not claim as a practising physician, as he was not licensed to practise as such, and unless he was duly licensed so to practise, if he practised as a physician he would be liable to a penalty, and his conduct would be illegal. As a general rule, every contract is void “if it stipulates for the performance of an illegal act, or if it be founded on an illegal consideration (*Smith on Contracts*, p. 192, 5th ed.) In England, as Lord Justice KNIGHT-BRUCE observed in *Reynell vs. Spyre* (3 De G. M. and G., 672), “even a deed, *ex facie* just and righteous, may be vitiated and avoided by alleging and adducing extrinsic evidence to prove that it was founded on a consideration or had a view or purpose contravening law or public policy.” “When a contract,” says Lord TENTERDEN, C.J., “which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no Court will lend its assistance to give it effect” (*Wetherell vs. Jones*, 3 B. & Ad. 221). As a rule the sole question will be,—Does the statute mean to prohibit the contract? And as *Broom* observes in his *Commentaries on the Common Law* (p. 358, 4th. ed.), “such an intention on the part of the Legislature may be manifested as well by the infliction of a penalty as by express prohibitory words, for a “penalty” implies a “prohibition.” For this he cites Lord Holt in *Bartlett vs. Vinon*, in Carthew’s

Repts., p. 252, which we have not in the High Court Library. A similar principle existed in the Roman and Dutch Law, as may be seen from the *Code* IV. 7. 1, and *Voet.* XII. Tit. V. s. 5. "*Si in turpi vel iniusta causa nihil quidem datum, sed tantum promissio facta sit, exceptio agentis ex tali promissione opponi potest, vel cautio seu chirographum, continens promissionem, condici.*" Mr. *Forster* contended strongly that the mere fact that the plaintiff was licensed as a medical practitioner of some kind would enable him to recover his fees for any branch, but I think that the case of *Leman vs. Fletcher* shews that this is not so. That was an English case and decided under English Acts, not applicable to the Colony; but under English statute law a similar distinction had been drawn between the physician and surgeon, and consequently it was held that a medical practitioner who was registered as a Member of the College of Surgeons only, and who had no other qualification, could not recover for attendance and medicines supplied in other than surgical cases. Looking at our own statute law I think a similar principle should be laid down in this Colony. The plaintiff did not shew in the Court below that the services rendered were surgical or performed in his capacity as accoucheur. An opportunity will be given him to do so. The Court will therefore allow this appeal, and remit the case to the Magistrate to take evidence upon this point, and after hearing it to decide the case. The costs here and in the Court below are to abide the decision of the Magistrate.

LAURENCE, J.:—I quite agree with the judgment just delivered, and it is scarcely necessary that I should add anything to what has been said. I think, however, it may be apposite to refer to a case of some interest and difficulty of which I was reading a report the other day, which was recently argued in the English Courts, and which involves the application of the same principles of law as are applicable to the matter now before us. The case is that of *Nie and Another vs. Rust*, and the following are the material portions of the report, which will be found in the *Times* of April 4:—

"A question here arose upon an arrangement for an apprenticeship which had proved abortive, and it turned out to be so difficult that it

1884.
May 1.
" 2.
" 8.
—
Quinn vs.
Harris.

1884.
 May 1.
 " 2.
 " 8.
 ———
 Quinn vs.
 Harris.

puzzled the Judges, and they were divided in opinion. The guardians of the boy desired to apprentice him, and agreed with an ironmonger that the boy should be apprenticed to him for the term of four years, the premium to be £50. A deed of apprenticeship was arranged, and was left in the ironmonger's hands, apparently upon the understanding that he should execute it, and send it to the boy's guardians. In the meantime the premium was paid, and the boy was sent to the ironmonger's. The Stamp Act of 1870 (33 & 34 Vict. ch. 97, sec. 40) requires apprenticeship deeds to be stamped, and provides further that if any premium be paid, and no such deed be made, a penalty of £20 is to be incurred, and the contract is to be void. In the present case, however, the deed was not executed or stamped, and the boy went on for six months, when he did something wrong, for which it appeared his friends thought he might be prosecuted, and his master was desirous that he should leave, and the boy's guardians agreed that it would be better for the boy that he should be removed, and they accordingly removed him, without anything being agreed as to a return of the premium. After the boy's removal, however, they made a claim for a return of the premium, which was refused, and the boy's guardians sued in the County Court for it, and recovered £25. The tradesman appealed against that decision, insisting that he had a right to retain the whole £50. On the part of the boy's guardians it was urged that the apprenticeship, which was the consideration for the £50, had failed, and so they were entitled to a return of the money. On the part of the ironmonger it was urged that he had not sent the boy away and was not in fault, and further that the transaction was illegal, and that therefore the money could not be recovered. After a long argument the Court was divided in opinion on the case. Mr. Justice DAY said, though the case had been very ably argued, he really felt a great difficulty as to the judgment to be given, especially as it was very difficult to get at the facts as they appeared on the evidence at the trial. . . . There was, however, a far more serious question of law, for it was contended that the transaction was illegal under the Stamp Act (33 & 34 Vict. ch. 97, sec. 40), which provided that if the premium was paid and no deed made, then the master, or anyone a party to the transaction, shall forfeit £20, and the contract is to be void. Did the case come within that enactment? If so, then it was illegal, and no party to the transaction could sue upon it. The words of the Act were, 'if any such sum be paid in respect of an apprentice.' Was this sum paid as premium upon an apprenticeship? It was so stated in the receipt, and therefore it came within the enactment, and then by the Act the transaction was illegal and invalid. It was the evident object of the Legislature to require that no money should be paid on an apprenticeship, unless it was paid upon a deed duly executed and stamped and truly stating the 'consideration' or premium. In this case, however, no apprenticeship deed was executed at all, and so the case came within the terms of the statute and also within its 'mischiefs' (for the consequence had been that the Government had lost the stamp), and the result was that the payment of the premium was illegal and so could not be recovered. He regretted to have to come to this conclusion, as the result would be great hardship and injustice. The jury

appeared to have taken a sort of equitable view of the case, and to have tried to do a rough kind of justice between the parties by dividing the premium between them; but he was of opinion that in law no part of it was recoverable, and therefore that the judgment was wrong and must be set aside. Mr. Justice A. L. SMITH said he rather differed in opinion from his learned brother. The premium of £50 had been paid in consideration of an apprenticeship for four years, but in consequence of the deed not having been executed, no such apprenticeship took place. The guardians had a right to make a claim either for breach of the implied contract to execute the deed or for a total failure of 'consideration.' In his view the ironmonger, the defendant, not having bound himself for the four years, in consideration of which the £50 was paid, the consideration had wholly failed. The money was undoubtedly paid in consideration of the deed of apprenticeship, and in the expectation that it would be executed by the defendant. It was said that the transaction was illegal as the deed had not been executed, and that therefore the premium could not be recovered; but if it were so the master would benefit by his own wrong, and he could not bring himself to believe that such was the law. He thought he could see a way out of the difficulty, which was this—that though the parties might be liable to a penalty and the contract of apprenticeship was to be void, the master was still liable for a breach of his implied contract to execute the deed, and for that he would be liable for damages to some amount, and therefore he thought the judgment should stand. Leave to appeal was given."

1884.
May 1.
" 2.
" 8.
Quinn vs.
Harris.

It might perhaps appear dangerous or even presumptuous to express an opinion on a matter in which a Divisional Court in England has been divided; but I confess that I find it more easy to follow the reasoning of Mr. Justice DAY, especially bearing in mind the provisions of the Act by which *any party* to the payment of a premium for an apprenticeship without the execution of a deed was made liable to the penalty, and the contract itself was rendered not merely voidable but void. The case illustrates the observation of KNIGHT-BRUCE, L.J., which has already been quoted, and which appears to be to the effect that it is equally impossible to recover on a contract involving *malum prohibitum* as on one involving *malum in se*. Whether the contract is illegal or immoral in the broader sense, or there is merely a breach of a statutory enactment, perhaps imposed for purposes of revenue, the Courts will equally refuse to lend themselves to its enforcement; and the somewhat subtle suggestion of Mr. Justice SMITH might tend, if developed, to an infringement of this rule. Even, however, taking the view of that learned Judge, it would not cover the present case; for that view

that any notice of objection had been given to the applicant, or that time had been given to him to meet the objection, the Court, on the petition of K., granted issue of process under the provisions of Rule 190. A summons was accordingly issued, calling on the members of the Licensing Court to shew cause why their proceedings should not be set aside or corrected, and why the licence should not be renewed, and why they should not pay costs; the summons set forth the above irregularities and others. On the return day the respondents made no appearance, and the Court, after argument by the applicant's counsel, ordered that the proceedings should be set aside, that the Distributor of Stamps should issue a licence similar to the one previously held by the applicant, and that the members of the Licensing Court should pay the costs.

This was an application, under Rule of Court 190, praying that the process of the Court should issue, calling upon the Chairman of the Kimberley Licensing Court to return and certify to the High Court a copy of the record of the proceedings in the matter of the petitioner's application for a licence, which the Licensing Court had refused, and further calling upon the Chairman and members to shew cause why the proceedings should not be set aside or corrected. The petitioner's affidavit set forth that he had in 1881 purchased, for the sum of £2000, certain premises at Bultfontein known as the "Kaffrarian Arms," which had enjoyed a wine and spirit licence ever since 1874, and that since 1881 he had spent £1200 in improving them; that he had applied for a renewal at the sitting of the Licensing Court on the 6th of March, 1884, and that his application was refused; that the record of the proceedings contained the following note:—"Sub-Inspector Robinson states, 'On the 14th of September, 1883, fined £10 for selling during prohibited hours. Sworn information lying in R. M. office for similar offence—mitigating circumstances in connection.' Refused. Application for limited licence refused." The affidavit went on to say that the conviction mentioned was the only record against the applicant since he had bought the premises in 1881, and that it was for selling at 8.30 P.M. to some customers who

1884.
May 1.
" 8.
" 13.
—
Kemp vs.
Kimberley
Licensing Court.

1884.
 May 1.
 „ 8.
 „ 13.
 ———
 Kemp vs.
 Kimberley
 Licensing Court.

were on the premises, the doors having been closed, as required by the licence, at 8 p.m., and that this happened only a few days before he became entitled to keep his premises open until 9 p.m. With regard to the sworn information, he asserted that the charge had been withdrawn. The petitioner's affidavit then went on to say that no objection had been taken by anyone to his licence, but that immediately on hearing the Inspector's report the licence was refused, before the petitioner or his agent could tender evidence by which he was prepared to shew that the licence ought not to be withheld; further that the proceedings in Court were so hastily conducted that he had not time to rebut the statements of the inspector, and did not obtain a fair and impartial hearing, and could not produce many respectable and influential inhabitants who would have given evidence on his behalf; in proof of the hurried procedure he stated that, upon the day when his application was disposed of, the Court sat for only three hours, and disposed of more than sixty applications. He further stated that the Court held an adjourned sitting on the 26th of March, 1884, on which day his agent applied for a re-opening of the case, and presented a numerous and influentially signed petition of the majority of the residents in the vicinity of his premises, praying the Court to reconsider its decision, and to grant the licence, but that this application was peremptorily refused. The affidavit stated that the property had in consequence of the decision become comparatively worthless, and that the petitioner had thus been deprived of the means of supporting himself and his family.

Davison, for the applicant, submitted that the petition set forth a *prima facie* case of unjust action on the part of the Licensing Court, and that it was not necessary to do more to induce the Court to grant the issue of its process under the 190th Rule; *Queen vs. Kolibele*, 1 Buch. E. D. C. Rep. 190.

LAURENCE, J., referred to *Queen vs. Justices of Exeter*, reported in the *Times* of 31 March, 1884, in which case COLERIDGE, C.J., held that Licensing Boards must take evidence on oath.

Davison.—The 48th Section of Act 28, 1883, gives the Licensing Court very wide powers in that it enacts that the Court “may of its own motion take notice of any matter or thing which in the opinion of the members thereof would be an objection to the granting of a licence although no objection has been made by any person;” but it goes on to provide that “in any such case the Court shall inform the applicant and shall adjourn the further consideration of the application, should the applicant so request, for any period not less than four days, in order that the person affected by such objection may be afforded an opportunity of replying thereto. The Court shall, after any such adjournment, give notice in writing, signed by the president, of the cause of objection to the person affected thereby, and of the day on which the adjourned application will be considered.” None of these provisions had been observed. This, however, was an application for a renewal of a licence, and such applications are dealt with by section 50–55 of the Act. Section 53, with regard to objections to a renewal of licence, provides that “the persons objecting shall cause notice of the intention to object and grounds of objection to be given to the applicant at least two days before the sitting of the Licensing Court. If such notice shall not have been given, such Court may notwithstanding, if it see fit, adjourn the hearing of the application to a further day, and require the attendance of the holder of the licence on such day, and may then consider the objections and determine thereon.” No notice of objection was in this case given to the applicant.

JONES, J.:—Section 46 provides that any member of a police force may object in writing or personally at any meeting of a licensing Court to the granting of a renewal of a licence.

Davison.—The Court must deal with such objection properly as provided by Section 53; and moreover the objection ought to be proved by proper evidence given on oath as provided by section 40. Here the Court refused the licence on an unsworn report of an inspector of police. A

1884.
May 1.
„ 8.
„ 13.
—
Kemp vs.
Kimberley
Licensing Court.

1884.
 May 1.
 „ 8.
 „ 13.
 ———
 Kemp vs.
 Kimberley
 Licensing Court.

previous conviction for a contravention of some provision of the liquor Acts is not of itself sufficient to warrant the forfeiture, and, if it were, there was no legal evidence of the conviction. There was no objection taken to the licence, and if there had been one no opportunity of meeting it had been given.

THE COURT held that a sufficient *prima facie* case had been made out for process to issue, under the provisions of the 190th Rule of Court, calling on the members of the Licensing Court to shew cause why their proceedings should not be set aside or corrected, and ordered that summons to that effect should be served forthwith and should be returnable on May 8.

Postea (May 8),—

The summons was returned, and the respondents made no appearance. The summons called upon the chairman and members of the Licensing Court to return and certify a copy of the record in the application, and to shew cause why the proceedings should not be corrected or set aside and why a licence as prayed should not be granted to the applicant, and why the respondents should not pay costs, (1) on the ground of the irregularity of the proceedings in that no opportunity was given to the applicant of being heard; (2) because no evidence relative to any objection was taken on oath as required by section 40; (3) because no objection was taken against the granting of the licence under either the 46th or 53rd sections; (4) because due information of any objection was not given as required by section 48; (5) because the grounds of refusing the application were insufficient in law and in fact; (6) because it did not appear on the record that any of the objections under section 52 were taken; (7) because no return was laid before the Court by the clerk to the Resident Magistrate as in section 72 provided; (8) because the proceedings were otherwise irregular and *ultra vires*. The copy of the record sent up to the Court contained merely the nature of the application to the Licensing Court, the name of the applicant, the situation of the premises and the note already set forth.

Davison, for the applicant :—The record shews no evidence on oath. The case of *Queen vs. Justices of Exeter*, coupled with section 40 of the Act, is strongly in favour of the contention that the evidence must be on oath or otherwise the proceedings are irregular.

1884.
May 1.
" 8.
" 13.
—
Kemp vs.
Kimberley
Licensing Court.

LAURENCE, J.:—Is there not a presumption that the evidence was taken upon oath ?

Davison :—On the record it only purports to be "stated." The summons set forth as one of the irregularities the fact that the evidence was not on oath, and there is no answer to the summons. But even if the evidence had been taken on oath, it discloses no valid ground for refusing the licence. If there be no conviction at all, an applicant under section 50 of the Act is entitled to a renewal of his licence, provided of course he be not objectionable on other legal grounds.

JONES, J.:—Then a conviction is a reason for a refusal ?

Davison :—Two convictions are a reason for forfeiture, under section 76 ; but even they must be two convictions within six months. The Legislature then could not have meant that one conviction during the three years would work a forfeiture.

LAURENCE, J.:—You contend that sections 50 and 76 must be read together.

Davison :—Yes ; and I read the sections to mean that one conviction during the three years gives a *locus standi* to take objection to the renewal, while two convictions within six months are enough to justify an absolute refusal. Section 51 shews that one conviction is not enough to justify a refusal ; for if it were, why should a special section be passed enacting that two convictions in six months create a liability to forfeiture ? The penalty for one conviction is that it renders the applicant liable to have objections to his renewal raised. No objection was raised in the present case in the manner required by the Act.

1884.
May 1.
" 8.
" 13.
—
Kemp vs.
Kimberley
Licensing Court.

JONES, J.:—You say that if an objection were taken, you were entitled to notice or to time to meet it?

Davison:—Yes; and further that no objection was taken in this case.

JONES, J.:—Is there any way of getting the Court together again?

Davison:—Only by proclamation under section 96.

JONES, J.:—The ordinary course for us to pursue would be to remit to the Licensing Court for further consideration; but we have no means of calling them together or of making them reconsider the matter.

Davison:—We must assume that if the Court or any members of it could have shewn cause against the correcting or setting aside their proceedings, they would have done so. They have not appeared, and I would ask the Court to take the bare record, which shews no objection taken, and the fact that none of the members of the Licensing Court can shew that there was any objection properly taken to the renewal of the licence.

THE COURT inquired in what manner the Supreme Court had caused its order to be executed in like cases.

Davison:—In previous cases in this Court an order was made on the Distributor of Stamps to issue a licence.

JONES, J.:—The Court will take time to consider the nature and form of their order.

Postea (May 13),—

THE COURT set aside and corrected the proceedings of the Licensing Court, and granted an order on the Distributor of Stamps to issue a licence to the applicant similar to that formerly held by him.

Davison applied for costs against the members of the Licensing Court *de bonis propriis*.

Hopley, on behalf of the Mayor of Beaconsfield, one of the respondents, opposed the granting of costs against him, on the ground that he had been sitting as Mayor *ex officio*, and that the Licensing Court was a public body trying honestly to discharge its duties for the public benefit. No *mala fides* had been shewn.

1884.
May 1.
" 8.
" 18.
Kemp vs.
Kimberley
Licensing Court.

THE COURT held that in this case the Act laid down plainly the duties of the Licensing Court, and these duties had been disregarded. By their failure to comply with the provisions of the Act, which constituted their authority, the members of the Court had placed themselves in the same position as if they had acted entirely without jurisdiction, and there must be an order against them, jointly and severally, to pay the costs which had been incurred.

[Applicant's Attorneys, PALEY & COGHILAN.
Attorneys for the Mayor of Beaconsfield, KNIGHT & HEARLE.]

MCCRANN vs. KIMBERLEY LICENSING COURT.

Licensing Court.—*Rule of Court* 190.—*Act* 28, 1883.—*Costs*.

Where an applicant was entitled to a certificate of renewal of his licence under section 50 of Act 28, 1883, and the Licensing Court required him to transfer his licence on the ground that the situation of his premises was unsuitable, and the applicant thereupon obtained new premises, to which no objection was taken, and the Licensing Court then refused to renew his licence,—Held, that the proceedings of the Court must be set aside, and a licence issued to the applicant for the new premises, and that, the action of the respondents having been illegal and ultra vires, they must pay the costs of the application.

This was another application for review of the proceedings of the Kimberley Licensing Court. The applicant's affidavit stated that he had held a licence for certain

1884.
May 1.
" 8.
" 13.
McCrann vs.
Kimberley
Licensing Court.

1884.
 May 1.
 „ 8.
 „ 13.
 ———
 McCrann vs.
 Kimberley
 Licensing Court.

premises in Pniel Road, Kimberley, since 1881; that at the recent sitting of the Licensing Court he had applied for a renewal, but that, owing to objections raised by the Directors of the Standard Diamond Mining Company, he was informed by the chairman that the board had determined not to renew his licence for the said premises, but, as there was no personal objection to the applicant, the Board would give him three weeks to obtain another stand for the purpose of applying for a transfer. The applicant had accordingly after much trouble obtained another stand, which had been inspected and approved by the Police Department, and had duly applied for the transfer of his licence to the said stand. The Commissioner of Police informed the Board that his department had no objection to the transfer, and no objection was raised in any other quarter, but the Chairman, after consultation with the other members of the Court, refused either to grant the application for a transfer or to renew the existing licence. During the three years the applicant had held a licence there had been no conviction and, so far as he was aware, no complaint against him. Upon this affidavit process was granted under the 190th Rule of Court, and a summons was served on the members of the Licensing Court, calling upon them to return and certify to the Court a copy of the record and proceedings in the above matter, and to shew cause why the said proceedings should not be set aside or corrected and a licence issued to the applicant on the grounds: (1) that by sect. 50 of Act 28, 1883, the applicant was entitled to a certificate of renewal of his licence, he having uninterruptedly held the same for a period of three years in respect of the premises then in his occupation, and not having violated any of the provisions of the said section; (2) that the Board had no power to refuse to renew the licence for the said premises, or to direct the applicant to remove to other premises and make further application for a licence for the same; (3) that, having given such order or direction, the Board had no power, after it had been complied with, to refuse to transfer the licence; (4) that, even if the applicant was not entitled as of right to a certificate under sect. 50, no objection having been taken under sects. 48 or 52, or

lodged as required by sect 53 of the Act, the Board had no power to refuse the application; (5) that no proper records were kept of the proceedings; (6) that the proceedings were in other respects irregular, illegal and *ultra vires*. The respondents were also called upon to shew cause why they should not be ordered to pay the costs of the application. The summons was made returnable on May 8, when there was no appearance on behalf of the respondents.

1894.
May 1.
" 8.
" 13.
—
McCrann vs.
Kimberley
Licensing Court.

Forster, for the applicant, after referring to the facts as above set forth, contended that under sect. 50 of Act 28, 1883, the functions of the Board were purely ministerial, and the applicant was entitled, as of right, to a renewal of his licence. A licensed victualler, who had conducted his business properly for three years, had a vested interest. Even if this were not so, no objection having been taken under sect. 48 or sect. 52, the applicant was still entitled to a renewal. If there is any force in sect. 50 the applicant can claim as of right, subject to the provisions of that section itself and of sect. 51; otherwise one who has held a licence for three years is in no better position than a new applicant.

LAURENCE, J.:—You contend that under sect. 50 you can claim as of right, and that the objections stated in sect. 52 cannot be raised against an applicant who fulfils the conditions of the former section? Of course any licence is liable to be forfeited under sect. 76.

Forster contended that no objection could be taken to the applicant's licence being renewed, except on the grounds set forth in sect. 50, or in the event of his not having conducted his business in conformity with the terms of his licence. The Court had no right to refuse the renewal, or to order the applicant to remove to another stand. Then, when the applicant had complied with this order, and obtained new premises of which the police approved, and to which no objection was taken, the Court clearly had no right to reject the application. No objections were taken under sect. 52, while, if the Board professed to act under sect. 48, no

1884.
 May 1.
 " 8.
 " 13.
 —
 McCrann vs.
 Kimberley
 Licensing Court.

notice was given to the applicant, and the provisions of the section were not complied with. Under either section, it was necessary that notice of the objections raised should be given to the applicant, and the Legislature clearly intended that applicants should not be taken by surprise; he referred to sect. 53, and to the case of *Queen vs. Justices of Exeter*, cited *supra* in *Kemp's* case.

LAURENCE, J.:—Under the English Act there is an appeal.

Forster :—And here, by the Charter of Justice, there is the right of review. He also referred to sect. 40 of the Act, and contended that, if the livelihood of a man who had held a licence without complaint for three years was to be taken away, there should at all events have been evidence taken on oath, and filed of record.

JONES, J.:—The Court is of opinion, on the facts as stated, that the applicant is entitled to relief, but we will take time to consider the form in which the order of the Court should be made.

Postea (May 13),—

JONES, J., said:—The same observations apply to this application as to that of *Kemp*, and a similar order will be made, with this difference only, that the Distributor of Stamps will be directed to issue a licence for the new premises, as to which no objection has been made, instead of for the old.

LAURENCE, J.:—I concur. At the same time I must not be supposed to assent to the contention that one who has held a licence for three years is entitled as of right to a renewal under section 50, subject only to the provisions of the section itself. Section 50 enacts that such an one shall "subject to the provisions in this Act contained, and without notice, be entitled" to a renewal; and the provisions in this Act contained must include those contained in sections 48 and 52. Here however no objections were taken by any

one, and no notice was given to the applicant; and in the absence of such objections and notice the refusal of the application was clearly illegal and *ultra vires*.

On the application of *Forster*, the COURT ordered the respondents to pay the costs of the application.

1884.
May 1.
" 8.
" 13.

McCann vs.
Kimberley
Licensing Court.

[Applicant's Attorney, BEEVOR.]

In re CONN.

Executor Dative.—Ordinance 104, 1833, Section 21.—
Removal of Executor.

Where C. had died leaving a will, but making no appointment of executors thereto, and the Master had thereupon advertised and appointed A. and B. executors dative as if to an intestacy, and B. was alleged to have subsequently absconded from the country with a large portion of the assets; upon the application of A. that the appointment of executors dative should be set aside as null and void ab initio, on the ground that the Master had acted ultra vires in treating the estate as an intestacy; Held, that notice of the application to remove him must if possible be served on B.

The applicant, Caroline Magdalena Conn, was in the year 1862 married without community of property to Fergus Conn, who at that time had an illegitimate son, called Fergus Conn, junior. Fergus Conn the elder died in 1879, leaving his illegitimate son, his widow and nine legitimate children surviving him. Shortly before his death he made a will instituting all the said survivors his joint heirs, but naming no executors of the will. On the 19th December, 1879, the Master of the High Court issued an edict notifying to the next of kin and creditors that the deceased had died intestate and appointing the 4th of February, 1880, for the election of executors dative. Accordingly on that date the applicant and the illegitimate son, Fergus Conn, junior, were appointed jointly as executrix and

1884.
May 8.
In re Conn.

1884.
May 8.
In re Conn.

executor of the estate. The final administration and liquidation was through various causes delayed and the applicant alleged on affidavit that her co-executor, who had had the sole management of the estate, had in July, 1883, absconded with a large portion of the assets of the estate, and that he had not since returned. The present application was to set aside the appointment of the executors dative on the ground that the Master had acted *ultra vires* in treating the estate as intestate when there was a valid will filed in his office. Affidavits having been read setting forth the above facts, and annexing copies of the will and the Master's edict,

Hoskyns, C. P., for the applicant, argued that the appointment of executors was null and void *ab initio*. The late Master who issued the edict had evidently considered that the will was void for want of the appointment of an executor, and had treated the estate as an intestacy. In this he was clearly wrong, as Section 21 of Ordinance 104, 1833, expressly provides for cases of this nature. He should have appointed executors to the will and not to an intestacy. In the present case if the executors administered the estate as an intestacy according to their appointment, neither the widow nor the illegitimate son would have any share, whereas under the will they each received a share.

JONES, J., suggested that the mere use in the edict of the word "intestate" did not shew that the Master had treated the whole will as null and void. He might have meant that the deceased died intestate as regards the appointment of executors; and when he appointed executors he may have done so that they might administer the estate in terms of the will.

Hoskyns, C. P., said that the terms of the edict were clear and contradicted this view. Moreover he was instructed that the estate had been treated as an intestacy.

THE COURT:—Surely there must be some notice to the co-executor, who is alleged to have absconded, that it is sought to remove him?

Hoskyns, C. P.:—No doubt where an executor has been properly appointed there must be notice, but in this case Fergus Conn had never been properly appointed. He was appointed under a misapprehension of either facts or law by the late Master. Moreover he had absconded and absented himself from the Colony, and that in itself was sufficient ground for his removal.

Hopley appeared to watch the case on behalf of the Master.

1884.
May 8.
In re Conn.

THE COURT was of opinion that the very gravity of the charges against the co-executor made it the more necessary that he should be summoned if possible, and made an order that Fergus Conn should be summoned by edict to shew cause on August 20, 1884, why he should not be removed from his office of executor dative to the alleged intestate estate of the late Fergus Conn on the grounds (1) of alleged improper election to the office and (2) of misconduct in absconding and absenting himself from the Colony. Service of the summons to be personal if possible, and if not publication thereof to be made in the *Government Gazette* of the Colony, in the *London Gazette* and in the *London Times*, one insertion in each paper. Costs to come out of the estate.

[Applicant's Attorney, D. J. HAARHOFF.
Attorneys for the Master, GRAHAM & GILBERT.]

CHRISTIE, N. O., vs. MANBY.

*Act 9, 1858, §§ 26-42.—Assessment of rates on Crown lands.
—Liability of purchaser.*

In April, 1883, a Divisional Council had caused a valuation of all the immovable property in the division to be made under the provisions of Act 9, 1858, and a farm then belonging to the Government had been so valued. A Court for hearing objections to the valuation was held in May, and no objections were taken, whereupon in June, after due notice, the Council held a meeting and assessed a

general rate, which became payable on August 1, 1883. On August 14, 1883, the said farm was sold by the Government, on perpetual quitrent tenure under the provisions of Act 14, 1878, and the defendant became the purchaser and owner thereof. In an action against him by the Council for the rates on the farm which were payable on the 1st August, 1883: Held, that he was not liable.

1884.
May 8.
Christie, N. O.,
vs. Manby.

This was a special case stated for the decision of the Court. The plaintiff sued in his capacity as Chairman of the Divisional Council of Hay. The pleadings set forth that in April, 1883, the Divisional Council of Hay caused a valuation of all the immovable property in the division to be made, under the provisions of Act 9, 1858. Farm No. 228, at that time the property of the Colonial Government, was so valued. On the 2nd May, 1883, a Court for hearing objections to the valuations was duly held, and no objection to the valuation was made. On the 13th June, 1883, after all the notices provided for by section 38 of Act 9, 1858, had been duly given, the Council held a meeting and assessed a rate of a half-penny in the pound on the basis of the said valuation, and the said rate became due and payable on the 1st August, 1883. On the 14th August, 1883, farm No. 228 was sold on perpetual quitrent tenure, under the provisions of Act 14, 1878, and the defendant became the purchaser and owner thereof. The plaintiff contended that the defendant was liable for the rate due on the 1st August, 1883. The defendant denied his liability, on the ground that at the date of the valuation the farm in question was Crown property, and as such not liable to assessment in terms of section 28 of the Act, and, further, on the ground that he had had no opportunity of objecting to the valuation, and also on general grounds of informality and irregularity.

Hopley, for the plaintiff:—Section 26 of Act 9, 1858, provides that all persons owning immovable property within any division, except such property as is specially exempted from *assessment*, shall be liable to be *rated* on account of such property. Section 27 provides for valuing all and singular the immovable property situate in such division. By section

28 all immovable property vested in the Colonial Government is exempted from the liability to be "assessed" or "rated" under the provisions of the Act "so long as it continues to be so vested." Section 38 provides that "as soon as the valuation of the whole of the immovable property in a division shall have been completed, the Divisional Council may proceed to assess and impose upon all persons liable thereto such a rate as it may deem necessary and expedient for the purposes of the Act;" provided, *inter alia*, that no general rate shall be imposed in the same division more frequently than once in twelve months. Section 39 provides that the *rate so assessed* shall become due and payable upon a certain day to be fixed by the Divisional Council, after due notice; and section 42 provides that a *valuation* shall be made every five years. In the present case the valuation had been made in April, 1883, and the rate had been assessed on the 13th June, 1883. Though in June, 1883, the farm in question was still Government property, and, as such, not liable to assessment, yet the valuation in April had been properly made in case it should become liable to assessment of rates during the succeeding five years. The Council had imposed a general rate of a half-penny in the pound on all property liable to be rated, and now contended that upon the change of ownership in the farm it immediately became liable for rates for the current year. The case of *Divisional Council of Queenstown vs. Brown, Buch.*, 1876, 48, was somewhat similar and might be held to be adverse to the position taken by the plaintiffs in the present case, which would have been stronger had they brought the action for a rate which became due after the property had been transferred to the defendant. If however the defendant's reading of the statute were correct, the farm would not be liable for rates for five years, which could never have been the intention of the legislature.

Lange, for the defendant, was not called upon.

JONES, J. :—It is clear that the defendant cannot be held liable for a rate on property not liable to assessment at the time of the assessment, and which rate became due on such property as was liable to assessment before the purchase

1884.
May 8
Christie, N. O.,
vs. Manby.

1884.
May 8.
Christie, N. O.,
vs Manby.

by the defendant. Not only did the valuation and assessment both take place before the defendant purchased, but the rate became payable throughout the division before that event. Both the *dies cedit* and the *dies venit* had then passed. The case quoted is exactly in point, and settles the matter. With regard to the rates which may be assessed in the future and before the next valuation, the Court does not feel called upon to express an opinion, which would be only an *obiter dictum*, as to what will be the legal position of the parties. As to the present claim judgment must be given for the defendant with costs.

LAURENCE, J., concurred.

[Plaintiff's Attorneys, GRAHAM & GILBERT.]
[Defendant's Attorney, RHODES.]

EUROPEAN DIAMOND MINING CO. LIMITED, vs. MYLCHIREEST.

Neighbouring Claimholders.—Liability for cost of hauling fallen ground.—Contributory negligence.

The purchaser of dangerous claim-property is bound to use reasonable care and expedition in making it safe.

Where one claim-holder sued for the cost of hauling ground, alleged to have been brought down from the claims of another by the careless and dangerous blasting of the upper claim-holder, and contributory negligence on the part of the plaintiff was alleged but not clearly proved, the defendant was held liable for the expense incurred.

If one claimholder has to undertake the hauling of ground for the expense of which another is responsible, and invites the latter to check his tally of the number of loads hauled, and the responsible claimholder neglects to do so, he will be held liable for the quantity hauled according to the tally kept, in the absence of proof that such tally is incorrect.

This was an action for the cost of hauling certain fallen ground and for damages alleged to have been sustained by the plaintiff company owing to the negligence of the defendant. It appeared that on Oct. 18, 1883, the defendant purchased certain claims in the Dutoitspan Mine from the liquidators of the Globe Company; some of these claims were high and dangerous, and adjoined the ground of the plaintiff company. The plaintiffs alleged that in or about the months of November and December, 1883, owing to the negligence of the defendant, 1228 loads of ground fell from certain of the defendant's claims into those of the plaintiff company, and that after giving defendant due notice of this, to which he paid no attention, the plaintiffs eventually had to haul it out, after requesting the defendant to send some one to keep a tally, which he neglected to do, and the said ground was deposited on the plaintiff company's claims, and there kept at the disposal of the defendant; for this work the plaintiffs claimed the sum of £307. The plaintiffs further alleged that in the month of January, 1884, certain other claims of the defendant were in so dangerous a condition that the plaintiffs were ordered by the Inspector of Mines to stop working until these claims were made safe, whereupon they agreed with the defendant to make these claims safe and haul out the ground, the defendant undertaking to pay the sum of £60 for the detention suffered by the plaintiffs, and to pay for the ground hauled at the rate of 5s. a load; the work was accordingly done, and the defendant sent a man to keep tally of the loads hauled but, as the plaintiffs alleged, removed him before the work was completed. The only question at issue as to this part of the case, on which the plaintiffs claimed £558 15s., and the defendant tendered £512 5s., was as to the number of loads for which defendant was liable. As to the alleged falls in November and December, the defendant denied that they took place, and further said that, if any ground fell as alleged, it was owing to the reckless and improper acts of the plaintiffs themselves in working and blasting in defendant's claims. He denied having received notice from the plaintiffs, and said that, if they did the work in question, it was not on his behalf or at his instance and request.

1884.
May 9.
" 15.
" 16.
" 19.
" 23.

European
Diamond Mining
Co., Limited vs.
Mylchreest.

1884.
 May 9.
 " 15.
 " 16.
 " 19.
 " 28.
 ———
 European
 Diamond
 Mining Co.,
 Limited, vs.
 Mylchreest.

The plaintiffs led evidence as to the state of the defendant's claims and his manner of working, and to prove the occurrence of the disputed falls, one of which according to the evidence took place in October, a few days after the defendant purchased the claims, and the other early in December. Evidence was also called to prove the sending of the notices to the defendant, and to disprove his allegations of improper working on the part of the plaintiff Company. The defendant's evidence as to the first two falls was chiefly negative, to the effect that neither he nor his *employés* saw them occur; while as to the third fall, on the estimate of Messrs. Woolley and Tucker, two surveyors who were called for the defence, the claims in question had only contained a certain number of loads, and some of these had fallen elsewhere, and had been hauled and deposited on a particular spot by defendant himself, and there measured by Woolley, and the difference, less some 240 loads of diamondiferous soil, was the amount for which the defendant was liable; the remaining loads which, as was proved by the tally, the plaintiffs had hauled on this occasion, had fallen, it was alleged, not from the defendant's claims, but from those of another claimholder named Isaacs. The defendant also led evidence as to the state of the claims and their boundaries, with the object of shewing that the plaintiffs had worked beyond their boundary and in the defendant's claims, and so produced the December fall, if it really occurred, and plans and models were produced in support of this contention. A large number of witnesses were called on both sides, but the facts, so far as material, will sufficiently appear from the arguments and judgments reported below.

Hopley (with him *Bowles*), for the plaintiffs, contended that the evidence bore out their claim, and proved that the disputed falls had occurred, and were attributable to the negligence and improper working of the defendant, who had taken no notice whatever of the numerous letters and accounts sent to him, until he made the arrangement as to the January fall. If the plaintiffs had worked in the defendant's claims as alleged, the defendant or some of his *employés* would certainly have noticed it at the time. As to the work

done in January, the defendant could only set up certain vague calculations of his surveyor against the exact tally kept by the plaintiffs.

1884.
May 9.
" 15.
" 16.
" 19.
" 28.

Lord, Q.C., for the defendant, contended that the plaintiffs had by their own working rendered the ground alleged to have fallen in October unsafe; the defendant denied the fall, and the plaintiffs, in their letter giving notice of it, had not distinctly fixed the date or amount of the fall. The probability was that this ground had been dribbling down from time to time, in consequence of the plaintiff company working below, and previous to the defendant's purchasing the claims; when a solvent person became the owner, the plaintiffs thought it a good opportunity to get paid for removing this ground. The plaintiffs claimed 5s. a load for this work, but he contended that, if the defendant was liable, 2s. a load would be nearer the mark. As to the alleged fall in December, the defendant's witnesses must have seen it if it took place; moreover, it was clear that the plaintiffs had encroached and worked to some extent in the defendant's claims, and so must have contributed to the fall, if it actually occurred. With regard to the work done in January, he contended that the evidence shewed that the tender was sufficient.

European
Diamond
Mining Co.,
Limited, vs.
Mylchreest.

Hopley replied on the facts, and further argued that if a man bought dangerous ground, he took it *cum onere*; there was nothing to support the allegation that the defendant in the present case worked with great diligence to remove the danger. No doubt the defendant obtained these claims at a lower price in consequence of their dangerous state, of which he must be taken to have had notice.

Cur. adv. vult.

Postea (May 28th),—

JONES, J.:—In this action the trustees of the European Diamond Mining Company of Dutoitspan Mine (Limited), sue Mr. Joseph Mylchreest, a digger carrying on mining

1884.
 May 9.
 " 15.
 " 16.
 " 19.
 " 28.
 —
 European
 Diamond
 Mining Co.,
 Limited, vs.
 Mylchreest.

operations in Dutoitspan, for £307 for work and labour performed by them in hauling and removing ground which is alleged to have fallen from the defendant's claims by reason of the negligence of the defendant. Two falls of ground are said to have occurred, "in or about the months of November and December, 1883," according to the plaintiffs' declaration, but in evidence sworn to have happened, the first about the end of October, and the second towards the end of December. For the removal of the ground or reef which fell in October, and was removed towards the end of November and commencement of December, the plaintiffs claim £85 5s., and for hauling that which fell in December and was hauled in January a sum of £221 15s. In addition to this they claim £498 5s. for hauling ground which fell from defendant's claims in January, under an agreement between plaintiffs and defendant, that they should blast down, haul and make safe certain dangerous ground of the defendant standing in claims 127 and 128, at the rate of 5s. per load of 16 cubic feet; and lastly, a sum of £60, which was agreed upon as being the amount to be paid by defendant to plaintiffs for compensation for the damage sustained by the stoppage of the plaintiffs' mining operations in January. The defendant filed certain pleas, but, on cause shewn, was allowed to withdraw them and file amended pleas. By these he denies the falls of ground alleged to have taken place in November and December, and says that, if any such fall did occur, it was "owing to the reckless and improper acts of the plaintiff Company in from time to time improperly *blasting in the claims belonging to the defendant.*" He denies that he received any notice of the falls of ground from the plaintiff Company, or that the plaintiff Company performed the work alleged by them, and if they did perform it he says that it was not done at his instance and request. As to the claim for £498 5s. he admits the agreement alleged by the plaintiffs, and that they did blast, haul and make safe a quantity of his dangerous ground as agreed upon; but he disputes the amount claimed, upon the ground that they did not haul the number of loads alleged; and he tenders, in respect of this claim, £452 5s., and in addition the sum of £60

prayed for in the declaration, together with costs of suit up to the 6th of March, 1884. The plaintiffs in reply admit the tender of £512 5s. but deny its sufficiency and join issue generally.

From the evidence it appeared that the plaintiffs' claims adjoined those of the Globe Company. In October last the defendant purchased the Globe Company's claims. At the time of this sale the defendant's claims 118, 119, 127, 128 and 129, had hardly been worked at all, and stood high above the adjoining claims of the plaintiffs. Next to claim 129 there was a claim, 120, which had been allowed to lapse into the hands of the London and South African Exploration Company, the owners of the soil. During the early portion of the year 1883 this claim had become dangerous, and the owners had paid the plaintiffs for working it down, and it was worked so as to slope towards the plaintiffs' claims to the south. On the 23rd October the reef or ground from claim 129, and small portion from 128, is said by the plaintiffs' witnesses to have fallen across claim 120 into their adjoining claims. The defendant's witnesses, on the other hand, swear positively that they never saw this fall of ground. Whether they saw it or not, on the 23rd of October the secretary of the plaintiff Company wrote to the defendant that a large quantity of reef had fallen from the claims "recently purchased by him from the liquidators of the Globe Company into the claims of the company," (*sic*) and informed him that unless it was removed before Tuesday the 30th October, the directors of the plaintiff company would take such steps in the matter as they might be advised. The defendant during the trial did not admit the receipt of this letter; but upon the evidence I personally incline to the opinion that he must have received it, though there may be room for doubt. It seems strange that no reply whatever was sent by the defendant. Nothing was done by the plaintiffs between this date and the 26th of November, when we find the Secretary of the European Company again wrote to the defendant. His letter is as follows:—"Referring to my letter of the 23rd ult., to which no reply has up to the present been received, and of which no notice has been taken by you in so far as this Company is concerned, I am

1884.
May 9.
" 15.
" 16.
" 19.
" 28.

European
Diamond
Mining Co.,
Limited, vs.
Mylchreest.

1884.

May 9.

„ 15.

„ 16.

„ 19.

„ 28.

European
Diamond
Mining Co.,
Limited, vs.
Mylchreest.

instructed to give you notice that as the ground fallen from your claims into those of this company has now become a hindrance to its working, and as you have taken no steps to remove the said ground, my directors purpose (in order not to further impede their operations, and thus save you from heavier expense) commencing on Wednesday morning next to haul out the said ground on your account at the rate of 5s. per load, and I have to request that you will either attend personally or by your representative on the day above mentioned, in order to arrange with our manager, Mr. Brunton. In the event of your failing to attend as requested the work will be proceeded with, and you will be held responsible for all loss or damage my company may sustain by reason of your default." The receipt of this letter is not admitted or denied by the defendant, but he admits that, if received (and he says he received many letters which he does not produce), he did not reply to it, or meet Mr. Brunton for the purpose named. I see no reason for thinking that this letter (which came out of the possession of the defendant's attorney) miscarried. The defendant does not appear even to have visited the ground for the purpose of inspection. He did not meet Mr. Brunton. The plaintiffs hauled the ground which was lying in their claims, and kept a tally, and they now say 341 loads of the defendant's reef were hauled. The evidence upon this claim is very conflicting, and the effect left upon my mind certainly is that there is reasonable ground for doubting, firstly, whether the defendant can be held liable for the fall if it did occur, and secondly, whether the reef actually hauled fell from his claims at the time and in the manner alleged. Upon the first question, I do not doubt that the rule laid down by BARRY, J.P., (*Leo, Kennedy and Murray vs. Ramsbottom*, Buch. Repp. C. A., Vol. 1, Pt. 1. p. 46) is good law. "The fact," says the learned Judge, "that defendant's claims were eighty feet above those of his neighbours was alone some evidence of negligent working. Possibly that negligence might have been attributed to previous holders of these claims; but when a man purchases a claim, he acquires the burdens as well as the privileges attaching to it; and it will therefore be his duty to work

down such a claim with great care and expedition, in order to place his claim on a level with other claims." It is not contended by the plaintiffs in this case that the defendant could have removed the danger between the 17th October (the date of his purchase from the liquidators of the Globe Company) and the 23rd October, when the fall from claim 129 is said to have taken place; but it is urged that because he bought this claim he must be held responsible for the negligent working down of his predecessor in title. Whether this be good law it is not now necessary for this Court to decide. In the face of the evidence given by the defendant's witnesses, and the fact that even in the plaintiffs' Secretary's letter the date when the fall is said to have occurred is not mentioned, and the undoubted fact that the reef had previously been dribbling down from 129 into plaintiffs' claims, I do not feel satisfied that I can give judgment in favour of the plaintiffs for hauling the loads claimed in what may fairly be called their first count. From Woolley's evidence it would appear that when he first saw the ground in October he could not see from whence the fall had come, but he seems to have thought some came from 120; how much he does not say. Of course it may be said that upon this point he was not cross-examined; but the plaintiffs' counsel elected to take this course, and the Court must presume that he had good reason for doing so. Whether the fall was the result of the plaintiffs' working in 120, or of their blasting in their own claims, or the result of the action of the weather, does not appear to me clearly shewn, and I should not feel justified in finding on the evidence that it was the result of the defendant's negligence or that of his predecessors, the liquidators of the Globe Company. It seems strange that the plaintiffs, though they completed the hauling of this reef early in December, did not send in their account for it until the 8th January. Moreover the evidence of the number of loads which are said to have fallen from 120, 128 and 129 is of a most unsatisfactory character. As the Court is not satisfied that the plaintiffs have made out their claim, but at the same time is not convinced of the justice of the defendant's contention, absolution from the instance will be the form of the Court's decision upon the

1884.

May 9.

,, 15.

,, 16.

,, 19.

,, 23.

European
Diamond
Mining Co.,
Limited, vs.
Mylchreest.

1884.
 May 9.
 " 15.
 " 16.
 " 19.
 " 28.
 ———
 European
 Diamond
 Mining Co.,
 Limited, vs.
 Mylchreest.

item of £85 5s. It is with some hesitation that I have arrived at this conclusion. The *onus* is upon the plaintiff to prove his case, and if he fails to convince the Court, after a careful consideration of the facts, that his claim is just, judgment cannot be given in his favour.

On the 22nd December, we have the first letter relating to the second fall of ground. Defendant is called upon to remove, before the 27th December, a quantity of reef and yellow ground which is alleged to have fallen into the plaintiffs' claims owing to the blasting operations of the defendant, and is told that, if he does not remove it, the plaintiffs will haul it themselves, charging the tariff usual in such cases. The defendant is requested, in the event of the plaintiffs hauling the ground, to have some person in attendance to keep tally, and indicate where the defendant desires the ground to be deposited. "My Directors," the letter continues, "have further to request that you will give such instructions to your *employés* as will prevent a recurrence of the matter complained of." *More suo*, the defendant neither replies to this letter, nor visits the scene of the fall. Meanwhile the plaintiffs haul the ground. On the 8th January of this year the Secretary of the European Company again indites an epistle to the stolid defendant, and makes an effort to arouse him by enclosing the account for £85 5s., for the ground hauled after the October fall. The defendant is told that the ground which fell on the 22nd December is being removed, and that he may soon expect to see their account. "I am instructed to draw your attention to the dangerous manner," writes the Secretary, "in which your blasting operations are being carried on, and to inform you that certain quantities of reef and stone are continually falling from your high ground into our claims, and a large slip is likely at any time to occur." This is followed by a threat to hold defendant liable for all loss or damage which the Company may sustain. Now it appears from the evidence that during the preceding two years little or nothing had been done to claims 118 and 119. They stood towering above the neighbouring claims of the defendant, exposed to the action of the weather. When the defendant bought his claims in October he com-

menced to work 115, 116, 117, and was working in 118 and 119 in December, and from thence he worked into 129, 128 and 127. Meanwhile the plaintiffs had been working their claims in the usual manner. It is now asserted that there was no fall of ground, and if there was it was in consequence of the plaintiffs' blasting in 118 and 119. There is overwhelming testimony that the defendant was blasting in and around these claims in December. This is sworn to by Brunton and Odendaal (witnesses for the plaintiffs), and was admitted by the defendant's witnesses, Parsons and Cullen, and by the defendant himself. On the other hand, we have it stated that the plaintiffs themselves were blasting during the month of December. In every case, upon being pressed, the witnesses to this alleged fact were obliged to admit that during that particular period they had not actually seen the plaintiffs' servants blast in these claims—they only fancied they saw their servants digging and picking at ground which had fallen through blasting operations. Again a theory is propounded that the plaintiffs removed a buttress of ground standing on 118 and 119 which supported the higher ground on which the defendant was carrying on his operations. Mr. Woolley, however, I think, though called for the defence, settled this theory by shewing that the "hollow" in claims 118 and 119—from whence came the ground which must have been the support of the higher ground—existed in October, 1883, when he first was called in by the defendant. In this he is corroborated by the testimony of Mr. Ward, who swore that the cause of the "hollow" was a slip which happened in February, 1883, after he joined the plaintiff Company. In contradiction of the defendant's allegation that this fall was caused by the blasting of the plaintiffs' servants, we have the testimony of Brunton, Odendaal and Ward, whose evidence upon this point I see no reason to doubt. We have then, dry, cracked, high ground, standing exposed to rain and weather for two years, the defendant blasting close to it, and a fall of ground into plaintiffs' claims from the place where he was blasting; while a few men were digging and picking in the bottom of a hollow, in a manner which certainly was not the immediate cause of the fall. The conclusion at which the Court has

1884.
May 9.
" 15.
" 16.
" 19.
" 23.
—
European
Diamond
Mining Co.,
Limited, vs.
Mylchreest.

1884.

May 9.

" 15.

" 16.

" 19.

" 28.

—
European
Diamond
Mining Co.,
Limited, vs.
Mylchreest.

arrived is that this fall was caused by the defendant's blasting, and, following the decision in the case already cited, he must be held liable for the consequences of his negligence. On this head the plaintiffs claim for 887 loads hauled. They kept a tally; defendant was asked to send some person to represent him, and act as his tallyman; he did not do so. Some doubt seems to have been cast upon the accuracy of the tally kept; but I do not see reason for thinking it inaccurate. The plaintiffs claim 5s. a load for hauling these loads. The Court, however, has come to the conclusion that 3s. would, in this particular case, be an ample and sufficient remuneration. Mr. Brunton admitted that this amount would cover expenses. On the second count, the judgment must be for the plaintiffs for £133 1s. or 3s. a load for 887 loads. As to the third count, we have merely to consider the number of loads hauled under the agreement between the plaintiffs and defendant. The plaintiffs claim for 1993 loads; the defendant tenders for 1809. It is said that, in addition to the loads actually falling from the defendant's claims, there was other ground which fell from Isaacs' claims. The plaintiffs admit there may have been about 20 or 30 loads at the outside, while the defendant's witnesses go as high as 300. With reference to this rather extravagant figure, it is evident that these witnesses were allowing their powers of imagination to have free play. None of them at the time made any careful estimate, and the defendant himself—the man most interested—did not take the trouble (which would naturally be expected from every man of business habits) of visiting the spot and examining the actual condition of affairs. He sent a tallyman, Seymour, to keep a tally. On Saturday night Seymour handed in his return of the number of loads hauled to date, and his services were dispensed with. Monday morning arrived, no tallyman appeared, and the plaintiffs hauled over 200 more loads; no explanation is sent as to the recall of the tallyman; but some time after the account is sent in the defendant stated that he withdrew his tallyman because he thought that the ground left might be fairly looked upon as belonging to Mr. Isaacs, or somebody else. Now this is not the manner in which business should be conducted. The

man who was sent down to tally knew nothing apparently of the condition of the mine or ground previous to the fall of ground in January, while his master does not think it worth while to go down and explain. Now that this case has come before the Court trouble is taken. The size of the ground from which ground had fallen is measured. Some of the ground had fallen into plaintiffs' claims, some into defendant's. Therefore, the defendant commences his calculation in this manner: the fallen ground filled such a space, which is equivalent to so many loads. I hauled out such a number of loads out of my claims, which had fallen from 127 and 128, and these were tipped at a certain spoil heap, and at certain other tipplings. I will deduct all these loads from the possible number which could have fallen from my ground, and the amount that is left will be precisely the quantity which must have fallen into the plaintiffs' claims. Now the result of this intricate and elaborate mode of calculating depends upon the accuracy with which the defendant separated the particular ground or reef which fell from 127 and 128 from the loose ground which had fallen or then fell into his claims; and precisely the same possible error would occur in removing reef and ground from his claims as might occur in the separation of ground in the plaintiffs' claims from that which had previously fallen into them. A little common sense would have avoided this waste of the expensive labour of a surveyor. It is, generally speaking, advisable when you pay a man to count to tell him beforehand precisely what he has to count. The proceedings of the defendant were simply a ridiculous absurdity. Seymour counted for a number of days simply the number of loads which came up the plaintiffs' gear, and then the defendant, without going to see what had been counted, came to the conclusion that he had counted enough. Allowing, however, a fair margin for the ground which may have been mixed with the defendant's ground, the Court thinks that 50 loads should be deducted from the plaintiffs' claim of 1993 loads, and in accordance with the agreement between plaintiffs and defendant will give judgment for 1943 loads, at 5s. a load, or £485 15s. instead of the amount tendered by defendant. Judgment will therefore be—as to the plaintiffs' claim for

1884.

May 9.

" 15.

" 16.

" 19.

" 28.

European
Diamond
Mining Co.,
Limited, vs.
Mylchreest.

1884.
 May 9.
 „ 15.
 „ 16.
 „ 19.
 „ 28.
 —
 European
 Diamond
 Mining Co.,
 Limited, vs.
 Mylchreest.

£85 5s. for the fall in October, absolution from the instance. As to the plaintiffs' claim for £221 for the fall in December last, judgment for the plaintiffs for £133 1s. As to their claim for £498 5s., judgment for plaintiffs for £485 15s. and for the sum tendered under the agreement, £60, or a total of £678 16s. As the plaintiffs have failed upon what I have treated as their first count, they will have judgment for this amount, and the defendant will be ordered to pay two thirds of the plaintiffs' costs.

LAURENCE, J.:—This case is one of some difficulty, as to one portion of it perhaps with regard to the law, but mainly owing to the great conflict in the evidence as to the facts in dispute. It may be divided into three heads; the claim made against the defendant in respect to the alleged fall on or about October 20, the similar claim for the December fall, and the question of the sufficiency of the defendant's tender for the work done by the plaintiffs under contract with him in January. After the full judgment which has been delivered, and in which I concur, I only wish to add a very few words as to the precise conclusions at which I have arrived with regard to each portion of the plaintiffs' claim. As to the alleged October fall, I think the balance of evidence is that a fall did take place in the month of October mainly from the defendant's claim 129, over 120, into the plaintiff Company's claims below. I do not think there is any evidence to support the defendant's suggestion that, if there was a fall at that time, it was owing to the plaintiffs' negligent working in 120, or that as a matter of fact they were then working in that claim, or in the immediate neighbourhood at all. The defendant's negative evidence as to this fall is very weak and unsatisfactory, especially as two of his principal witnesses, Parsons and Cullen, did not enter his employ till after the date on which it is said to have taken place. On the other hand, I am bound to say that I regard the plaintiffs' proof on the first count as by no means adequate. I think there can be very little doubt that a certain amount of ground did fall from time to time from 129 and the neighbouring claims, during the few months immediately preceding their purchase by the defendant,

and it is very probable that some of this was brought down by the plaintiffs blasting, as they admit they sometimes did, in the neighbourhood. Then on October 18 Mylchreest bought these claims, and on October 20 this fall of 340 loads is said to have taken place. On the whole, the conclusion at which I have arrived is that it is not clearly proved either that this fall, or the whole of it, took place subsequent to the purchase by the defendant, or, if it did, that it was attributable to negligence on the part either of the defendant or of his predecessors in title. The plaintiffs wrote a letter of complaint to the defendant on October 23, but it was a very vague letter indeed, and it is not positively proved that it ever reached the defendant. The evidence of Richards and Mills is no doubt strong on this point; but if, as is just possible, through some mischance this letter never reached the defendant's hands, or through the vague generality of its terms failed to command his attention, it may fairly be contended that he was somewhat prejudiced in his defence by the allegation in the declaration that the claims against him were on account of falls not in October but "in or about the months of November and December." The plaintiffs left the ground lying in their claims till November 29, when they began to haul; and I think they must then have had some difficulty in precisely ascertaining where all the fallen ground came from and when it fell. Odendaal, the plaintiffs' claim-manager, says about 2,000 loads fell in October, which is clearly absurd; and on the whole the conclusion to which I have come, with regard to the first count, is that although the balance of evidence on this point may perhaps be somewhat in the plaintiffs' favour, they have failed to prove their case to my satisfaction, and the defendant ought not to be held liable for the amount of the first account. As to the December fall, the plaintiffs' witnesses swear positively that on or about December 20, owing to the defendant's negligence in blasting, and not working down his high claims 118, 119 in a proper manner, 887 loads of reef and yellow ground, mainly the latter, fell into their claims 94, 95, 82, 83; and that this quantity was subsequently hauled, between December 26 and January 7, is clearly proved. An opportunity was given to the defendant to check the tally, but he

1884.
May 9.
" 15.
" 16.
" 19.
" 28.
—
European
Diamond
Mining Co.,
Limited, vs.
Mylchreest.

1884.
 May 9.
 „ 15.
 „ 16.
 „ 19.
 „ 28.
 —
 European
 Diamond
 Mining Co.,
 Limited, vs.
 Mylchreest.

failed to do so, and therefore the quantity must be taken to be correct. All that the defendant can do is to call one or two witnesses to give negative evidence that they did not see the fall, and to endeavour to prove that if it came down at all it was attributable to contributory negligence on the part of the plaintiffs themselves. On neither point does his evidence appear satisfactory. It is perfectly clear that the defendant was working and blasting in these claims shortly before the fall; and I can scarcely believe that the defendant, who knew his boundaries perfectly well, and who was daily in the mine, would have allowed the plaintiffs to encroach in the manner and to the extent now suggested without apparently a word of complaint at the time. The defendant says:—“Woolley shewed me the boundaries early in November. He shewed me the points from east to west, &c., and gave me the chart I have here. I think he also went down into the mine with me and shewed me the boundaries. He shewed me 118 and 119; there was nothing to do there but to take a tape-line and measure off. He shewed me the encroachments displayed in the model early in November.” Moreover, the evidence on this point, when analysed, is really conclusive. Brunton, Odendaal and Ward all state that, in the beginning and middle of December, the defendant was working and blasting in these claims, but the plaintiffs were working elsewhere. Olsen, who was in the defendant’s employ at the time, but who was called by the plaintiffs, gave similar evidence. And so too the defendant’s own witnesses; Parsons saw no blasting by the plaintiffs in these claims till January—and blasting, not picking, is the only contributory negligence alleged in the plea. He adds: “The defendant was working there in the early part or middle of December; I think there must have been a blast a week or so before.” Cullen gives similar evidence; and Quillen, another of the defendant’s men, says, “I saw no one working in December in 118 and 119, except defendant’s *employés*.” This being the evidence, I think the defendant is clearly liable on the second count; as to the amount, Brunton admits that pulling this ground was much cheaper work than both bringing down and pulling the reef, which was done in January at what I regard as the very remunera-

tive price of 5s. a load; and he also admitted, in reply to a question I put to him on the point, that 2s. 6*d.* would probably cover the actual expenses of hauling. On the whole, I think it will be quite sufficient to allow the plaintiffs 3s. a load for these 887 loads, which as we understand they have kept separate, and which of course must be regarded as the property of the defendant and at his free disposal. As to the third count, there is a great conflict of evidence, and I must say I think the parties would have been better advised if they had accepted my suggestion, and halved the small amount in dispute, instead of spending so much time and money and calling such elaborate evidence on a question whether the exact quantity for which the defendant was liable was 1993 or 1809 loads. On the whole, I have come to the conclusion that the tender is insufficient, and that all the ground hauled by the plaintiffs—with the exception of a few loads, which it is admitted by Brunton may have been mixed with it, and which I don't think on the evidence we can possibly put at a higher figure than 50 loads—was within the agreement and therefore chargeable to the defendant. The plaintiffs' evidence is positive and as to facts; the defendant's, on the other hand, is the speculative result of elaborate calculations, and all those calculations are vitiated by the unwarrantable deduction of over 240 loads of diamondiferous ground, which I think there is every reason to believe were inextricably mixed and pulled together with the reef. Assuming this to have been the case, the defendant's calculations give the plaintiffs a more favourable result than their own tally, especially after the deduction which we propose to make. These calculations, however, really go for very little, one way or the other; for, on the one hand, it is said that some of the ground pulled by the defendant was tipped elsewhere than on the spoil-heap, and therefore was not included in the estimates made by Woolley and Tucker; on the other, it appears that the calculations made from the cubical extent of the solid block make no allowance for debris or other superficial accumulations which very probably existed on the surface of the claims. As to the positive evidence, as distinguished from this theoretical evidence, which was led to the effect that reef and rubbish

1884.
May 9.
" 15.
" 16.
" 19.
" 22.
—
European
Diamond
Mining Co.,
Limited, vs.
Mylchreest.

1884.
 May 9.
 „ 15.
 „ 16.
 „ 19.
 „ 28.
 ———
 European
 Diamond
 Mining Co.,
 Limited, v.s.
 Mylchreest.

were previously lying in the plaintiffs' claims, and must have been pulled together with the stuff hauled on the defendant's account and improperly charged to him, I think that this must be taken partially to refer to the stuff which was hauled at the end of December, and partially to the rubbish from Isaacs's claims, which was mainly on claim 86, and which, as Brunton positively states, was quite separate from that hauled under the agreement. These being the conclusions at which we have arrived, the plaintiffs will have judgment for £133 1s. on the second count, and £485 15s. for their work and labour under the contract, and £60 as agreed damages on the third, making in all £678 16s., or a sum almost exactly intermediate between the plaintiffs' claim and the defendant's tender. Had there been three separate actions, the plaintiffs would have been entitled to judgment with costs on the second and third, and on the first, for the reasons already assigned, I think the proper judgment would have been absolution and no order as to costs. Taking into consideration the time and expense occupied in investigating respectively the three heads of dispute, I think it will be just and proper to order the defendant to pay two-thirds of the plaintiffs' taxed costs of suit.

[Plaintiffs' Attorneys, H. C. & J. C. HAARHOFF.]
 [Defendant's Attorney, RHODES.]

NONNE vs. BERRY.

False imprisonment.—Malicious prosecution.—Pound Law of Orange Free State.

N. lost a horse, which was impounded in the Orange Free State, and, contrary to the law of that country, indirectly purchased by the pound-master, B. B. brought the horse to Kimberley, where it was seized by N. After explanations between them, N. allowed B. to take away the horse on certain conditions. B. however subsequently charged N. with the theft of the horse. N. was arrested and tried by the Magistrate, B. giving evidence for the prosecution, and

the Magistrate dismissed the charge. Held, that the original arrest having been without warrant, and the proceedings without reasonable and probable cause, N. was entitled to substantial damages for false imprisonment and malicious prosecution.

This was an action for the recovery of £1000 as damages for false imprisonment and malicious prosecution. The declaration alleged that on April 2, 1884, defendant, who was pound-master at Jacobsdaal, in the Orange Free State, wrongfully, maliciously, and without reasonable or probable cause, procured the arrest and imprisonment of the plaintiff upon a charge of theft, and that plaintiff was detained in custody until he could find bail; and further that, on April 3, the plaintiff appeared before the Resident Magistrate of Kimberley in answer to the said charge, and the defendant appeared and prosecuted the said charge and gave evidence against the plaintiff, but the Magistrate dismissed the charge, whereupon the prosecution was determined; that the proceedings were instituted and prosecuted by the defendant falsely, maliciously, and without reasonable and probable cause, and that by reason of these proceedings the plaintiff had suffered damage, &c. The plea admitted the facts set forth, save the unlawfulness and maliciousness of defendant's conduct, but denied that damage was sustained by plaintiff; it also denied that the plaintiff was imprisoned by the defendant. It set forth that on April 2 plaintiff without defendant's knowledge or consent seized and possessed himself of a certain horse, the property of the defendant; that the defendant thereupon gave information to the Commissioner of Police, who caused the arrest and the holding of the plaintiff to bail. It further set forth that at the hearing of the charge the defendant appeared and gave evidence against the plaintiff without malice and with reasonable and probable cause, as he was legally bound and compelled to do. The plaintiff joined issue on the defendant's plea.

1884.
May 12.
" 13.
Nonne vs.
Berry.

Hopley, for the plaintiff, led evidence to prove that on January 17, 1884, a horse belonging to the firm of Nonne

1884.
May 12.
" 13.
Nonne vs.
Berry.

and Koenig, produce dealers and canteen-keepers at Kimberley, of which firm the plaintiff was a partner, had been sent out to a farm a few miles from Kimberley to graze. It was then branded E.C. The owner of the farm deposed that the horse was lost on or about January 24. Nothing was ascertained about the horse until on April 2 the plaintiff, while standing outside the canteen owned by his firm, saw the horse pulling in a team which was drawing a light wagon from the Free State direction into Kimberley. He immediately caused the wagon to be stopped and, not getting any explanation which satisfied him from the driver, or a lady who was in charge of the wagon, he caused the horse to be taken out of harness and openly led into the yard of his produce store on the opposite side of the street. The horse then bore a new brand mark, partially hiding the old one, and it was stated by the people in the wagon that that was the mark of the pound from which the horse had been sold. The plaintiff and another witness swore that he told the lady in the wagon that if she would say who she was, or where she was going to, they would not unharness the horse, but that she merely said it was "none of their business" and sent for the defendant, who had preceded the wagon to Kimberley in a light cart. The defendant appeared shortly afterwards and demanded the horse. Plaintiff claimed it as his own, and thereupon defendant left in a rage, threatening to take out a warrant. He proceeded to the Assistant Clerk of the Peace, who made inquiries and, finding that defendant was a pound-master and had acquired the horse from the buyer, immediately after it had been sold from his own pound, and also that plaintiff had openly taken and claimed the horse, refused to issue the warrant and informed the defendant that his remedy was by civil action. The defendant then went to the Commissioner of Police and laid his complaint, without telling him of the refusal by the Clerk of the Peace to issue a warrant. The Commissioner at once sent a policeman in plain clothes with the defendant. On arrival at the plaintiff's place they found him there, and, after some discussion, he expressed himself satisfied that there had been a sale of the horse, but said he would like a certificate to that effect

from the pound-master. The defendant then informed him that he was himself the pound-master, and would send the certificate as well as the surplus money realised by the sale of the horse, which, in his capacity as pound-master, he held for the owner in case of his appearance. Plaintiff then consented to defendant's taking the horse. He did so and it was led to his hotel. He then drove off in his cart with the constable, and they proceeded to the police station, where defendant saw the Commissioner and said to him: "It's all right; I've squared the matter and have got the horse." The Commissioner, being under the impression that a crime had been compounded, said: "I can't have my policemen running about for nothing, go and fetch the man and the horse." Thereupon the defendant without further explanation drove the constable back to the plaintiff's place, and the constable informed plaintiff that the Commissioner of Police wished to see him. The plaintiff then went down to the police station in the defendant's cart. The Commissioner had, before their arrival, gone out on business and the plaintiff was detained at the station till his return. Meanwhile the following affidavit had been drawn up:—

"Theuniss Hermanus Berry maketh oath and saith: I am pound-master at Jacobsdaal in the Orange Free State. On the 2nd April I left my wife and a man named Geyer in charge of a wagon and six horses at the race course near Kimberley, and gave them instructions to be at Kimberley at about 9 A.M. This morning at about 11.30 A.M. Geyer came to me and said that some one had stopped my wagon in the middle of the street and outspanned one horse and took a reim with the horse. I went to the place and found my horse in the possession of Charles Nonne of Kimberley. I asked him for my horse and he refused to give it up. I reported the matter to the police. The horse is now in the possession of the police." The Commissioner on his return read this over to the defendant and said: "There is no charge. Do you charge Nonne with theft?" Defendant answered, "Yes," and the following words were then added, "I now charge the said Charles Nonne with the theft of my horse." The defendant then swore to and signed the affidavit. The plaintiff was then liberated upon the recognizances

1884.
May 12.
" 13.
Nonne vs.
Berry.

1884.
May 12.
" 13.
Nonne vs.
Berry.

of himself and his partner in the sum of £25 each. Next morning the plaintiff appeared before the Magistrate and was charged under Act 17, 1867, with theft of a horse. He pleaded not guilty. The defendant was sworn and gave evidence against plaintiff. After relating how he had left his wife and Geyer in charge of the wagon, his evidence proceeded: "From information I received I went to the house of the prisoner and found my horse in his yard. I asked for the horse. Prisoner refused to give it up. He said the horse was his horse. I told him the horse had been sold out of the pound. He still refused to give it up unless I produced a certificate from the pound-master. I said I could not give him one at once, but would send him one." Without any cross-examination or further evidence, the Magistrate found the prisoner not guilty, and discharged him. The plaintiff then brought the present action.

Forster called the defendant, who produced his pound book, which shewed that the horse had been entered as impounded on the 8th January, and sold on the 23rd February after due advertisement. (The entry of the date of the impounding was, however, in a different handwriting to the rest of the entry, and the next date entered was January 29). His further evidence was to the effect that the sale took place on February 23, the defendant being himself the auctioneer and forbidden by the law of the Orange Free State to purchase either directly or indirectly at such sale. The horse was knocked down to his son, a lad aged 15, who, defendant swore, was municipal ranger at Jacobsdaal and made money by speculation; and a day or two afterwards he exchanged this horse for another belonging to his father, who thus became possessed of the animal. As to the proceedings in Kimberley the defendant swore that he thought he was obliged to act as the Commissioner of Police directed, and that he was following his orders in all he did. He never protested against the proceedings—even after the explanations, which he admitted had been satisfactory—but his desire was to get back the horse, which the police detained from him.

Counsel having addressed the Court, the following judgments were given:

JONES, J., (after going over the facts) said that he could well understand that the defendant was very angry in the morning when he heard, and on going to the scene found, what had been done, and that he thereupon went to Mr. Truter, who would not grant him a warrant, that this might have made him still more angry, and that he then went to Captain Christian, the Commissioner of Police. But in asking his aid he ought most certainly to have informed him that the Clerk of the Peace had refused to issue a warrant. Instead of this he concealed this important fact, and a policeman was sent to assist him. He then had a satisfactory interview with the claimant of the horse, and admits that after this interview he knew that the plaintiff's intention throughout had been merely to assert his legal rights, and that he had no intention of stealing the horse. Notwithstanding this knowledge, in the afternoon he made what, under the circumstances, was a most unfair affidavit, concealing the facts which had come to his knowledge since the morning, and leaving the Commissioner of Police under the impression that the plaintiff had attempted violently to steal his property. That was the only reasonable interpretation of the affidavit, and the police could not be charged with officiousness in acting vigorously upon that affidavit. There were certainly no justifiable grounds, after the interview with Nonne and Koenig, for going on with the prosecution. The defendant must have known that as he got the horse out of pound, being himself the pound-master, there was a good ground for challenging his ownership; yet he allowed the plaintiff to be placed in the dock, and actually gave evidence against him. It was a serious charge, and a most grave position for the plaintiff to be in. Although the charge had been dismissed, the plaintiff was always open to the taunt of having been tried for theft. Moreover, upon reading the record of the defendant's evidence, it was difficult to see why the Magistrate had so promptly come to the conclusion of the plaintiff's innocence. It was certainly, as far as could be judged, not due to anything which the defendant had said. The plaintiff had not been absolutely damaged in his pocket to any very large extent, for beyond the fees to his legal adviser, whom he had engaged to defend him in the

1884.
May 12.
" 13.
Nonne vs.
Berry.

1884.
May 12.
" 13.
Nonne vs.
Berry.

Magistrate's Court, he seemed to have lost nothing; yet he had suffered a severe indignity, and the Court were of opinion that he should have £40 damages with costs.

LAURENCE, J.:—It is clear from the evidence in this case that, on the 2nd of April last, Berry, the defendant, charged Nonne, the present plaintiff, with the crime of theft. Berry gave Nonne in charge on the 2nd of April, and on the following day he prosecuted him before the Magistrate, by whom he was acquitted. Nonne, moreover, was charged under the provisions of Act 17 of 1857, which rendered him liable on conviction to be sentenced either to a long term of imprisonment, or to receive 25 lashes. It is clear also that Nonne had not committed the crime of theft, and that Berry at the time knew he had not. It is also obvious that Berry cannot shelter himself under the ægis of the police, or plead that he was coerced into committing a tort against his neighbour by a sort of moral terrorism on their part. He is a man of mature years, and apparently of at least average intelligence, and he must be held responsible for his own actions. I think it is proved by the evidence, though at first the facts were supposed to be otherwise, that when Berry pointed out the plaintiff to the policeman, who took him in charge, no warrant had been made out; and the action for false imprisonment will therefore lie. It is also proved that Berry voluntarily came to the Magistrate's Court the next day, and there prosecuted the charge of theft, well knowing that the plaintiff was not guilty of that crime, and therefore without reasonable and probable cause; the claim for malicious prosecution must therefore also succeed. The only remaining question is that of damages, and in assessing the damages all the circumstances must be taken into consideration. Now the horse, from the dispute about which all this trouble arose, is said by the defendant to have first come into his possession, in his capacity as the pound-master at Jacobsdaal, in the Free State, so far back as the 8th of January. But there is the clearest possible evidence that the horse was not lost from Schalkwyk's farm, at Peddiefontein, half-an-hour from Kimberley, till the 24th of January, and therefore cannot have reached Jacobsdaal earlier

than about the 25th of January. Schalkwyk must be taken to be an entirely impartial witness, and he corroborates Nonne as to the former having sent the horse to his farm on the 17th of January, and further states that he did not lose it till six or eight days afterwards. Schalkwyk was not cross-examined, and there was no suggestion as to any possible mistake in the identity of the animal. It is therefore impossible to believe that the entry in the pound-book of the 8th of January is a genuine entry, relating to this horse, although the description, so far as the brand is concerned, and in all respects, except perhaps as to the colour—which it is said ought to have been “blau schimmel” instead of “vaal schimmel”—appears to be a correct one. The circumstances with reference to this entry, the handwriting, etc., are undoubtedly suspicious; but all I will say is that it may be a genuine entry, antedated by some error on the part of the man who kept the defendant's books, or it may be purely fictitious, and made with a view to the purposes of this case. Then we have it that the horse was advertised in the Free State “Government Gazette” of the 6th of February, and sold, at one of the ordinary pound sales, on the 23rd of February. By whom was it bought? We are told that it was bought by the defendant's own son, a lad of fifteen, who was living with the defendant at his house, who is here to-day, but whom the defendant has not ventured to put in the box. It was bought by this boy for the sum of £7, though it is valued by the plaintiff at over £17, and either the same day, or a day or two afterwards, the defendant tells us that he exchanged this horse with his son for another, though of this transaction there is no evidence whatever beyond his mere assertion. Now the Pound Ordinances of the Free State, which have been put in, prohibit the pound-master from having anything to do with the purchase, “*direct or indirect,*” of animals sold out of the pound; to my mind there can be no doubt that this horse was indirectly acquired by the defendant, in direct violation of the provisions of the Ordinance. The defendant tells us that this is not by any means the only occasion on which he has thus acquired stock; all I can say is that it is a most pernicious practice, which he will do well to avoid in the

1894
May 12.
" 13.
Nonne vs
Berry.

1884.
May 12.
" 13.
Nonne vs.
Berry.

future. He is himself the auctioneer, and he acts in a fiduciary capacity; and if, as he says, he is in the habit of repurchasing animals at "a slight advance" on the auction price, it is obviously his interest, as he admitted with a levity which was very much out of place, to sacrifice sales and sell stock below its real value, and thus he places himself in a position in which his interest is in conflict with his duty. Now when Nonne seized his horse out of the defendant's wagon—doing so, as he tells us, because he failed to obtain any information as to whom the wagon belonged to, and where it was going—the defendant may not unnaturally, in the circumstances, have felt somewhat provoked and irritated, and he went to complain to the Assistant Clerk of the Peace, Mr. Truter. Mr. Truter very properly put some questions to the defendant as to how he acquired the horse; and when he found that Berry was a pound-master, and had bought it out of a pound, it is not at all surprising to me that in the end he regarded the complainant's story as unsatisfactory, and told him that he had better seek his remedy by way of a civil action. There is a considerable conflict between Truter and Berry as to what took place at this interview, as there is also between Berry and Captain Christian, the Commissioner of Police, as to what took place between them when Berry went to the Police Station with his complaint, without saying a word to the Commissioner about his previous unsuccessful application to the Clerk of the Peace. I will not enter into the details of these conversations; it is sufficient to say that when I find the defendant at variance with experienced officials like Truter and Christian, it is impossible to accept his version as likely to be more correct than theirs. Neither is it necessary to enter into the details of what took place between the plaintiff and the defendant on the day in question. It is sufficient to say that, after having made a friendly arrangement with Nonne that the latter should return the horse, and he should send him the receipt for the pound sale on his return to Jacobsdaal, and after having actually taken the horse back under this arrangement, Berry deliberately swore an affidavit charging the plaintiff with theft, went up to his place and had him arrested, and the next day gave evidence

against him in Court, apparently not thinking it worth his while to say a word, either to Captain Christian or to the Magistrate, as to the explanations which had been given and the understanding which had been arrived at. Thus the plaintiff must recover both for the false imprisonment and the malicious prosecution; and the case is one in which the owner has been charged with the theft of his own horse by one who, to say the least of it, has not been able to prove that he came by the horse honestly, and who has certainly failed to make out the allegation in his plea, on which the plaintiff joined issue, that the horse was his property. There is no evidence that the plaintiff has suffered any special damage, beyond the cost of his defence before the Magistrate, and it has not been proved what that came to; I suppose it could not possibly exceed £10, the prosecution having been very promptly dismissed before Berry had finished his evidence in chief. The plaintiff—who was released on bail shortly after his arrest—is, however, certainly entitled to something for the annoyance and indignity to which he was unwarrantably subjected. I should not say the case is one for vindictive, scarcely perhaps even one for exemplary damages; but the damages should be something more than nominal. Had I been sitting alone, I think I should have been inclined to award him the sum of £50; and certainly the sum of £40, and costs, for which he will have the judgment of the Court, cannot be regarded as in any way excessive.

1884.
May 12.
„ 13.
Nonne vs.
Berry.

[Plaintiff's Attorney, RHODES.
Defendants' Attorney, BEEVOR.]

BURMAN vs. WILD.

Provisional sentence.—Mortgage bond.—Breach of condition in bond.—Summons.

Where by the terms of the conditions of a mortgage bond it appeared that at the date of summons £120 should have been paid in twelve monthly instalments of £10 each, failing the payment of any one of which the whole debt and

interest would become due without notice, and the summons did not directly allege the breach of any condition, but stated that £60 had been paid on account: held, that a breach was alleged by implication, and provisional sentence granted.

1884.
May 13.
Burman vs.
Wild.

Provisional sentence was prayed upon a mortgage bond for £200 (less £60 paid on account) dated April 24, 1883. The summons alleged no breach, but the bond itself shewed that it was a condition that payment should be made in monthly instalments of £10, failing payment of any one of which the whole sum should become due and payable without notice, together with interest, &c., and the summons alleged that only £60 had been paid on account.

Hopley, for the plaintiff, argued that the breach of the condition was alleged by implication, as the dates shewed that £120 instead of £60 should by this time have been paid.

THE COURT granted provisional sentence.

[Plaintiff's Attorney, RHODES.]

RYAN vs. KIMBERLEY LICENSING COURT.

Licensing Court.—Rule of Court 190.—Act 28, 1883.

Where objections were taken by a member of a Licensing Court to the renewal of the licence of an applicant, who was entitled to apply for a certificate of renewal under section 50 of Act 28, 1883, and an adjournment was granted, and at the resumed hearing evidence was adduced on oath, and the licence was then refused, the Court refused an application for process under Rule of Court 190, holding that the petition disclosed no grounds for setting aside or correcting the proceedings.

This was another application to review the decision of the Licensing Court, refusing to renew the applicant's licence. The petition alleged that the applicant had held a licence for certain premises in the Transvaal Road since March 1880, during which period there had been no conviction and, so far as he was aware, no complaint against him; that at the last sitting of the Board, certain objections to renewal of the licence having been raised by Mr. G. Bottomley, a member of the Board, the further hearing of the matter was postponed for written notice of the objections to be served; that on the further hearing the applicant adduced evidence in rebuttal of the objections, but the Board refused to grant the certificate of renewal, applied for under section 50 of the Act, "mainly, as the petitioner was advised and believed, in consequence of certain verbal and unsworn statements then and there made by the said G. Bottomley, certain sworn testimony which was also adduced not being of such a nature as would justify such refusal, as the petitioner was advised and believed." The applicant therefore applied for process calling upon the Licensing Court to return into Court a copy of the proceedings and record, and shew cause why they should not be set aside or corrected.

Forster, for the applicant, relied on section 40 of the Act, and contended that all evidence, including objections taken by members of the Court under section 48, ought to be upon oath. It was the duty of members of the Court, at the adjourned sitting, to procure sworn testimony in support of their objections. He submitted that the applicant was entitled to a certificate of renewal under section 50.

THE COURT held that the petition disclosed no irregularity in the proceedings of the Licensing Court, and there was no *prima facie* case to justify the issue of process. On the contrary, it appeared that evidence had been taken on oath, and the proceedings of the Court had been in accordance with the provisions of the Act. The application was therefore refused.

[Applicant's Attorney, BEEVOR.]

1884.
May 13.
—
Ryan vs.
Kimberley
Licensing Court.

VAN NIEKERK AND GERTENBACH *vs.* PRETORIUS.*Trespass.—Ornamental timber.*

Where one farmer had accidentally trespassed on the farm of another and cut down two large and valuable trees: held, that the owner was entitled to substantial damages for the loss of the trees, regarded as ornamental timber.

1884.
May 14.

Van Niekerk
and Another *vs.*
Pretorius.

The plaintiffs, owners of the farm Doornlaagte, sued the defendant, the owner of an adjoining farm, for the sum of £200 as damages for trespass and cutting down two trees. The defendant admitted that his servants had inadvertently cut down two trees, belonging to the plaintiffs, and just over the boundary of his farm, but denied that he had converted the wood. He pleaded that in respect of these trees he had tendered £20 before action brought, and repeated the tender in his plea. The plaintiffs denied the tender and its sufficiency.

From the evidence of Van Niekerk it appeared that Doornlaagte was a very large farm, and that the portion adjoining defendant's farm was called Doornhoek; it had previously been an outlying homestead of the farm, and had lately been occupied by the servants of the plaintiffs. It was distant five or six miles from the main homestead; there was at present only a small and dilapidated house, but the largest dam on the farm was situated there, and the place was capable of being converted into a good homestead. The farm was about forty-five miles from Kimberley and was well wooded. There were several large camel thorn trees near to the house and dam at Doornhoek, and along the boundary of the two farms. In April, 1881, the plaintiff had let Doornhoek to one Lubbe, who was to cut down and ride wood on half shares, but he had prohibited him from cutting down any of the camel-thorn trees near the homestead of Doornhoek, which he thought highly valuable as ornamental timber. In August, 1882, the plaintiff discovered that the defendant had cut down some of his trees, and he then went and asked him what he would take for a similar tree

growing about 500 yards from his (defendant's) house. Defendant refused to sell it; plaintiff offered him £10, then £25, then £50 for it. On defendant refusing these offers, plaintiff remarked, "You have pronounced your own judgment," and took him to see the stumps of the trees. At first plaintiff thought eighteen of his trees had been cut down, but, on the defendant pointing out the correct boundary between the farms, it appeared there were only two. They were large trees, and the plaintiff estimated them at making about a load of wood each. Defendant had asked him how many loads he would want delivered in payment for the trees, but he denied any further tender. He had subsequently asked the defendant to settle for the two trees, but had received no answer. He considered his farm had been depreciated in value by at least £500 by the removal of the trees. There were still about twenty trees in the vicinity of the homestead. A witness named Anderson was called to give corroborative evidence as to the value of large trees on farms in Griqualand West.

The defendant's version of the facts differed in many respects from the plaintiff's. His servants, he said, had by mistake cut down two trees, which would have made together about half a load of wood, over the plaintiff's boundary. The first tree had been carried away to market and sold by Lubbe, the plaintiff's tenant, while the other had been left on the place where it was cut. Plaintiff came to his homestead and offered him £10 for a large camel-thorn tree about 500 yards off, which he refused. Plaintiff then offered £25, whereupon he said, "It is not worth it, but I don't want to sell it." He then offered £50, and the defendant replied, "It is not worth it, but if you have no camel-thorns on your farm I will make you a present of it." He said this, well knowing that there were many camel-thorns on the plaintiff's farm. Plaintiff then said, "You have pronounced your own judgment. You have cut down eighteen of my trees, and I claim £50 for each." He subsequently pointed out to the plaintiff that there were only two trees belonging to him which had been cut down, and tendered £10 for each tree, but plaintiff said, if the defendant proved to be right as to the boundary, he should make no claim for the two trees.

1881.
May 14.
Van Niekerk
and Another vs.
Pretorius.

1884.
Mar. 14.
—
Van Niekerk
and Another vs.
Pretorius.

Defendant also gave evidence as to some unpleasantness which had subsequently occurred between the parties, with regard to the impounding of some cattle, which, as was suggested, was the motive which had led the plaintiff to bring this action, a suggestion, however, which the plaintiff entirely denied. Defendant also called a lad named Erasmus and a native servant to corroborate him as to the alleged tender and waiver by plaintiff of his claim. Lubbe, the plaintiff's former tenant, deposed that he had sold the first of the two trees on the Dutoitspan Market. It made about a quarter of a load, and the whole load fetched £16. The trees were not extraordinary, and those which were left at Doornhoek were nearly the same size.

Lange, for the plaintiff, contended that these large trees were highly valuable and ornamental to the homestead at Doornhoek, and that the tender, which represented little more than their value as firewood, was wholly insufficient.

Hoskyns, C.P. (with him *Hopley*), for the defendant, pointed out that it was not a wilful trespass, and the farm could not be held to have materially deteriorated in value by the removal of two trees, when there were at least twenty similar trees remaining on the spot. Doornhoek was not the homestead, but a mere outpost. He contended that the evidence shewed this was a stale claim, which had only been revived owing to subsequent disputes between the parties. As to the tender, it was far beyond the marketable value of the timber, and if a sentimental value, or one depending on special circumstances, were prayed for, it ought to have been proved by independent witnesses who had been taken to the spot.

JONES, J., after referring to the pleadings, and commenting at some length on the facts proved in evidence, said the conclusion at which he arrived was that the portion Doornhoek of the farm Doornlaagte was a homestead, not at present inhabited by white tenants, but one which had the important advantage of possessing the largest dam on this large and valuable farm. It might therefore at any time again become a homestead, in which case the surrounding timber would add considerably to its value. The trees cut

down were two large and old camel-thorn trees, the slow growth and great value of which class of tree were well known to all residents in Griqualand West. As to the allegation that the defendant had tendered for the value of these trees before the action was brought, the fact of the tender had not been made out to the satisfaction of the Court. A tender of £20 was however made, or repeated, by the defendant's plea, and it thus became necessary for the Court to determine whether that was a sufficient amount. The Court had come to the conclusion that it was not sufficient. The tender was not much above the value of the timber as firewood, and in a country like this, where the inhabitants were only too apt to destroy timber, it could not be maintained that large trees, especially when growing near a homestead, had no greater value to their proprietor than merely their price when sold as firewood. In cases of this kind it was difficult to arrive at the exact amount which ought to be awarded; but on the whole the Court considered that £25 for the larger and £15 for the smaller of the two trees would be a fair award, and that the plaintiff should also have £10 for the loss of his wood, making in all £50, for which sum the plaintiff would have judgment, with costs.

1884.
May 14.

Van Niekerk
and Another v
Pretorius.

LAURENCE, J.:—This is an action of trespass; the trespass is admitted, but it is not contended that it was a wilful trespass; it admittedly arose out of a mistake as to boundaries. Had the defendant wilfully trespassed on the plaintiffs' farm and cut down their trees, in awarding damages we might have been guided by the principle laid down in the cases which were cited in this Court in *Hall vs. Compagnie Française* (High Court Repp., Vol 1, p. 464), and assessed the damages with regard not merely to the actual loss to the plaintiffs but also to the tortious conduct of the defendant. Neither is there any sufficient proof of conversion of the timber. As to one of the trees there is evidence that the wood was sold on the plaintiff's account; but as to the other it seems that, when Van Niekerk discovered that the tree had been cut down, he told the defendant to remove the wood, which he did; but he afterwards sent it back again, in Van Niekerk's absence, and without his knowledge

1884.
May 14
—
Van Niekerk
and Another vs.
Pretorius.

or consent, and thus the wood seems to have remained there till it was lost or stolen. In any case, the argument that the plaintiffs ought to recover nothing for the value of the timber as firewood seemed to me a very extraordinary one; even if both the trees had been sold without his permission, but on his account, and the proceeds paid to him—I say to him, for Van Niekerk is the real plaintiff—surely it may be presumed that, if he had sold them at his own discretion, and when the market was favourable, he might probably have done so to much greater advantage. The important point in the case, however, is the value of the trees as ornamental timber; such value is difficult to estimate, and the witnesses agreed in saying that it was very much a matter of taste; but because the value of a thing is difficult to estimate does not seem to be any reason for the Court pronouncing it of no value at all. Now these trees were two large and ancient camel-thorn trees, one 9 feet and the other 7 feet in circumference, situated close to the largest dam on a large and valuable farm, for which the plaintiffs had paid the sum of £10,200. It is true that there was no dwelling-house, in habitable repair, at Doornhoek at the time, the only dwelling-house on the farm being at Doornlaagte, five or six miles away; but the place was a homestead *in praterito*, the former owner of the farm having lived there, and may well be regarded as a homestead *in posse*. With population increasing, and the railway, it is to be hoped, soon to be coming through the district, it is unlikely that so large a farm should remain unsubdivided, and it may well be anticipated that Doornhoek will some day again become a homestead. The amenities of the spot undoubtedly have a value; and although there may be fifteen or twenty other trees nearly as large remaining in the neighbourhood, the loss of the largest of them all, that under which we are told a Mr. Du Toit used to pitch his tent and rejoice in its shade, is certainly not to be regarded as insignificant. The plaintiff, after sending a letter of demand for £100, claims £200 in this action, and said in the witness-box that he would not have taken £500 for the trees; but the plaintiff's valuation is clearly an exaggerated and sentimental one to which the Court cannot give effect. On the other hand, even if the

defendant did, as alleged, before action brought, tender the sum of £20 in compensation for the two trees, a fact of which I am by no means satisfied on the evidence, I consider that tender to be inadequate. Mr. Anderson, an independent witness, tells us that he would not take £50 for a tree which he possesses of similar size, but at a greater distance from his homestead; while I think it is clear on the evidence that the defendant himself refused the plaintiff's offer of £25 for a similar tree. For if he did not, why should the plaintiff have subsequently offered £50, as it is admitted he did, and why should he have proceeded, like another Nathan, to tell the defendant he had "pronounced his own judgment?" On the whole, the best conclusion at which I can arrive on the evidence before us is that substantial justice will be done by awarding the plaintiff £25 for the larger and £15 for the smaller tree, as ornamental timber, and an additional £10 for the value of the wood, making in all £50, and costs.

1884.
May 14.
Van Niekerk
and Another vs.
Pretorius.

[Plaintiffs' Attorney, RHODES.
Defendant's Attorney, D. J. HAARHOFF.]

CHISHOLM vs. ALDERSON'S TRUSTEE.

Exception.—Moneys had and received.—Proof on insolvent estate.

C. claimed to be entitled to prove on the insolvent estate of A. for a sum of money given by him to A., on an agreement that A. should with that and other moneys purchase a certain farm and hold it in trust for C. and others. A. failed to complete the purchase of the farm and the amount paid by C. was, as alleged, in consequence wholly lost to him. An exception to C.'s declaration, on the ground that the facts alleged did not entitle him to the relief claimed, was overruled.

This was an argument on exceptions. The plaintiff's declaration set forth that he was a produce dealer and that the defendant was the duly appointed trustee of William Alderson, appointed on the 11th of March, 1884; that in

1884.
May 15.
Chisholm vs.
Alderson's
Trustee.

1884.
May 15.
Chisholm vs.
Alderson's
Trustee.

November, 1880, William Alderson represented to the plaintiff that he had under offer to purchase or had provisionally purchased from one Renecke a certain farm called "Riet Kuil," together with certain wool-washing machinery then thereon, situated in the district of Fauresmith, in the Orange Free State, for the sum of £15,000, and offered a fifth share of or interest in the said farm and machinery to the plaintiff, after the said farm and machinery should become the property of the said William Alderson, at and for the sum of £3,000, and thereafter it was agreed by and between the plaintiff and Alderson that, in consideration of the premises, and that the said Alderson would duly pay to the said Renecke the whole of the purchase price of £15,000, the plaintiff would pay to the said Alderson the said sum of £3,000 for such one fifth share or interest. It was further agreed by and between the plaintiff and the said Alderson that on completion of the said purchase the said farm should be transferred into the name of the said Alderson, who should hold the same in trust for the plaintiff in respect of his share and interest in the said farm, and that the said amount of £3,000 should be paid by the plaintiff to the said Alderson. Afterwards, to wit on the 7th December, 1880, the said Alderson duly executed a deed of sale and purchase of the said farm and machinery from the said Renecke (a copy of which deed was annexed), and took possession and transfer of the said farm and machinery; that on or about December 10, 1880, the plaintiff duly paid to the said Alderson the sum of £3,000 for his fifth share of, or interest in, the said farm and machinery, and the said Alderson duly gave the plaintiff a receipt therefor (copy annexed); that in accordance with the terms of the said deed of sale the said Alderson duly passed his bond over the said farm and machinery as a security for the due payment of the purchase price to the said Renecke; that afterwards, the said Alderson having failed and neglected to pay the said Renecke the sum of £5,000, the balance of the purchase price of the said farm, &c., the same was duly sold in execution of a judgment on the said bond by which the said property had been mortgaged, whereby the said sum of £3,000 became wholly lost to the plaintiff. The plaintiff prayed to be allowed to

prove as a concurrent creditor on the estate for the sum of £3000, together with interest from the date of payment. The defendant took exception that the plaintiff's remedy was by an action to recover damages for breach of contract, and that no proof against the insolvent estate ought to be admitted until the damages should have been ascertained.

1884.
May 15.
Chisholm vs.
Alderson's
Trustee.

Lord, Q.C. for the defendant and excipient, argued that this was not an action for money had and received, but for damages for a breach of contract. The plaintiff had paid Alderson and Alderson, having paid the first instalment, got transfer of the property and passed the mortgage bond to secure the balance of the purchase price to the seller. Upon the giving of transfer the property passed; therefore there had been good consideration. There not having been a total failure of consideration, an action for money had and received would not lie: *Blackburn vs. Smith* (2 Exch. Repp., 783). The consideration to plaintiff was the getting the farm transferred to Alderson, and thus all he could recover was damages to the extent of one-fifth of the value of the farm, depreciated as it turned out to be. It was not alleged that the property became lost to the plaintiff through Alderson's breach of trust, but simply through his neglect to pay instalments secured by the bond.

Forster, for the respondent, was not called upon.

THE COURT overruled the exception, with costs, on the ground that the statements of facts in the declaration were capable of the construction that Alderson bought from Renecke and engaged to pay Renecke in order that Chisholm might acquire an interest in the property. In that case, Alderson not having paid, Chisholm acquired no interest, and thus there had been a total failure of consideration. Accordingly an action in effect for money had and received might lie.

[Applicant's Attorney, DEWHURST.
Respondent's Attorneys, STOW & CALDECOTT.]

DIXON *vs.* KIMBERLEY LICENSING COURT.

Licensing Court.—Act 28, 1883, §§ 29, 40, 46, 48, 53.

In the absence of clear proof of irregularity or mala fides, the Court will not interfere with the discretion of a Licensing Court in refusing an application for a licence under Act 28, 1883.

1884.
May 20.
—
Dixon *vs.*
Kimberley
Licensing Court.

This was an application for a review of the proceedings of the Kimberley Licensing Court. The applicant stated that at the last sitting of the Court he had applied for a licence for certain premises in Bean Street, Kimberley, of which he had been in occupation at a rental of £25 a month, and for which he had held a transferred licence for the last four months. The application was supported by seventy-two registered voters, resident in the ward where the premises were situated, but at the hearing of the application a counter petition, of which the applicant had received no notice, and which was signed by ten gentlemen and four ladies, was produced, objecting to the granting of the licence on the ground that the legitimate requirements of the neighbourhood were amply supplied by three other cantens situated within a radius of about 200 yards from the applicant's premises. On this petition being read, the application was immediately refused. The petitioner alleged that three out of the five members of the Licensing Court were "members of the Independent Order of Good Templars" and he had been informed and verily believed that "by virtue of the oaths administered to them on joining the said Order of Good Templars the said members were morally bound to interest themselves to prevent the sale of intoxicating liquors, and were thus disqualified, within the meaning of the Liquor Licensing Act, 1883, to sit as members of the Licensing Court." The applicant added that he had held an hotel licence at Kimberley for the period of ten years, during which period there had never been any complaint against him; he had been engaged in the liquor trade for the last thirty years, and if a licence were not granted to

him his means of earning a livelihood and supporting his wife and family would be taken away. It further appeared that very influential testimony to the respectability of the applicant, and his fitness for holding a licence, given by several leading inhabitants, had been produced before the Licensing Court.

1884.
May 20.
—
Dixon vs.
Kimberley
Licensing Court.

Davison, for the applicant, contended that notice should have been given to him of the objection. The Court summarily refused the application, without giving any opportunity of answering the petition against the licence. There was no evidence of the truth of the allegations contained in the petition. [THE COURT referred to sects. 46 and 48 of the Act, and pointed out that it was apparently only when the Court itself raised objections that the applicant was entitled to an adjournment.] The Court was bound to hear both sides, and this objection only came to light on the petition being read by the Court. If the Court could refuse a licence without inquiring into the objection, no licensed victualler's property would be safe. He contended that the Licensing Court had exercised no discretion in dealing with this matter. [THE COURT referred to sect. 40, which provides that evidence shall be taken on oath, but only "when any Licensing Court shall deem it necessary to take evidence respecting any question to be determined by such Court."] It was further submitted that three of the members of the Court, being Good Templars, were not impartial and ought not to have sat.

JONES, J.:—On the evidence before us, this case appears to be a very hard one, and the applicant seems to be a man of high character, and a suitable person to be intrusted with a licence. But these are matters that, in the absence of any right of appeal, we cannot go into. The only question is, has the Court below exercised its discretion? If so, we cannot interfere; and there seems to have been sufficient before the Court to prevent us from saying that it did not exercise its discretion in the matter before it. The application must therefore be refused.

LAURENCE, J.:—I concur. Speaking for myself, I think

1884.
May 20.
—
Dixon vs.
Kimberley
Licensing Court.

that, considering the character of the two petitions before the Licensing Court, and the strong testimony which was given in favour of the application, if I had been a member of the Licensing Court I should have decided otherwise; and if there had been a right of appeal I might have felt disposed to reverse the decision of the Court. But it seems to have been clearly intended by the Legislature that Licensing Courts should enjoy a very wide discretion, especially in dealing with new applications, such as this was; in such cases there appears to be no necessity for notice to be given of objections, sect. 53 requiring notice to be given only of objections to *renewals*. The Court in the present case must be presumed to have considered the petitions for and against, and as long as there is no irregularity or *mala fides*, and the Court keeps within the four corners of the Act, we have no power to interfere. As to the contention that some of the members of the Court were disqualified owing to their being Good Templars, it is sufficient to observe that there is no allegation that they fell within the provisions of sect. 29 of the Act, which explicitly lays down who shall be disqualified from being members of Licensing Courts.

[Applicant's Attorney, RHODES.]

CROSBIE vs. KIMBERLEY LICENSING COURT.

Licensing Court.—Act 28, 1883, §§ 38, 39, 48, 50, 53.

The Court will not review the decision of a Licensing Court which has varied the conditions under which a licence was renewed. "Conditions" in sect. 50 of Act 28, 1883, includes the "privileges" mentioned in sect. 39.

1884.
May 20.
—
Crosbie vs.
Kimberley
Licensing Court.

Application for review of the proceedings of the Kimberley Licensing Court. The applicant's petition stated that in 1881 he had purchased from his father his licensed premises, which had been licensed for the previous eight years, together with the good will, for the sum of £2000, and that he had expended

an additional £1000 on improvements ; that both in 1882 and 1883 he had applied for a licence with full privileges, which had been refused by the Licensing Court, but on each occasion he had appealed to the High Court, which had reversed the decision of the Court below, and granted a renewal with full privileges. At the last sitting of the Licensing Court he had again applied, and "the police, on being referred to by the Court, recommended the granting of your petitioner's licence as before, but the Chairman, on hearing this, interposed and asked what privileges your petitioner had enjoyed hitherto, as he could find no record of privileges in the Licensing Record book ; the police then informed the Court that full privileges had been granted to your petitioner on appeal to the High Court, whereupon, after a short discussion amongst themselves, the Court granted your petitioner's licence, but without privileges." The applicant further alleged that no evidence in his case was taken, on oath or otherwise, nor was any information given to him of any objection, nor was any other person deprived of the privileges he had hitherto enjoyed without any reason being assigned. He added that during the whole time he had held the licensed premises there had been no complaint or conviction recorded against him ; he further alleged that the proceedings of the Court had been so hurriedly conducted and the decision so hastily arrived at that his case did not get a fair and impartial hearing, and his property had been depreciated and his business materially injured by the decision of the Court.

1884.
May 20.
Crosbie vs.
Kimberley
Licensing Court.

Davison, for the applicant, said that no notice had been given of any objection ; there had been no conviction or complaint against the applicant, but the Licensing Court had arbitrarily refused to renew the privileges to which this Court had twice held the applicant to be entitled. [THE COURT referred to sect. 50 of Act 28, 1883, which empowers Licensing Courts to "vary the conditions upon which licences shall be renewed."] He contended that, as in renewal of licences, so in renewal of privileges an applicant was entitled to notice or information as to objections, and that the privileges were part of the licence. Privileges

1884.
May 20.
Crosbie vs.
Kimberley
Licensing Court.

were provided for in sect. 39, while the "conditions" referred to in sect. 50 were those mentioned in sects. 38 and 66. Even if privileges could be taken away, the Court must shew some reason; the merits were now the same as on the former appeals, and it was a fair case for review. The applicant ought to have had an opportunity of shewing that the privileges he enjoyed were for the benefit of the public.

JONES, J.:—The Court is clearly of opinion that this application must be refused. Formerly there was a right of appeal, and the Court could go into the merits; now there is only the extraordinary remedy of review under the 190th Rule of Court, and this Court can only grant relief when there has been a clear irregularity, when the Licensing Court has acted in excess of its jurisdiction, or failed to conform to the provisions of the Act. Here the Licensing Court, in varying the conditions under which the applicant's licence has been renewed, has exercised its powers under sub-sect. 4 of sect. 50. It has been contended that the only "conditions" which the Court may vary are those mentioned in sects. 38 and 66; but the privileges provided for by sect. 39 are also conditions under which the licence is held; and it is for the Licensing Court to satisfy itself as to the necessity for privileges, under sect. 39, just as much as in imposing conditions under the other sections.

LAURENCE, J.:—I am of the same opinion. I have only to add that it appears to me that the provisions contained in sects. 48 and 53 of the Act, as to notice being given of objections to the renewal of a licence, do not apply to the question of the conditions under which the licence is renewed, and do not govern sub-sect. 4 of sect. 50, which enables the Court to deal *inter alia* with the "privileges" of the licensee.

[Applicant's Attorneys, PALEY & COGHILAN.]

EASTER vs. LANGER.

*Malicious Prosecution.—Reasonable and probable cause.—
Costs.*

Where a Magistrate had given judgment in favour of a plaintiff in an action for malicious prosecution, on the ground that the defendant had instituted criminal proceedings without sufficient reason, but it did not appear that there had been an entire absence of reasonable and probable cause, or that the defendant had been actuated by malice, the Court, on appeal, changed the judgment into one of absolution from the instance, but, having regard to the fact that the conduct of both parties was open to censure, made no order as to costs.

Appeal from the Resident Magistrate of Dutoitspan. The respondent had been arrested, on affidavits made by the appellant and others, on a charge of malicious injury to property; a preliminary examination was taken, and he was discharged by the Magistrate. He then brought an action for malicious prosecution in the Magistrate's Court, and obtained judgment against the appellant for £15 and costs, and against this judgment the present appeal was brought. The Magistrate sent written reasons for his judgment, in the course of which he said, "I considered criminal proceedings had been taken against Langer without sufficient grounds, and that I considered Mr. Edwards, who bore the malice, had made a tool of Easter. What were called malicious injury to property and theft were really matters of civil action. [It appeared that Langer had been in occupation of a house which Edwards had sold to Easter. Easter had then obtained judgment in an action of ejectment against Langer, and the latter, as was alleged, on removing from the premises had carried away two doors and other fixtures and injured the structure of the building. Langer was then charged with malicious injury to property and theft]. It would be noticed that the affidavits upon which the criminal charge was founded were drawn up by Edwards, who

1884
May 20.
" 28.
Easter vs.
Langer.

1884.
May 20.
" 23.
Easter vs.
Langer.

intended Langer should be arrested; that upon reading the affidavits I would only take proceedings against Langer by summoning him; that any one in Court during the hearing of the case must have been struck by the intense animosity displayed by Edwards against Langer. I have no doubt the proceedings were instigated by Edwards, who remained in the background, and gave evidence in neither the criminal nor the civil case. After reading over the evidence taken at the preliminary examination I could come to no other conclusion than that criminal action had been taken where civil action would have sufficed. In my opinion, through ignorance of the law, Langer had been a sufferer in many ways. The removal of the doors, &c., were all matters hinging on the law of fixtures, and the partition in the iron house was damaged solely with the object of obtaining what Langer considered to be his own property. I stated I considered Easter should pay for Langer's defence, and that £5 should be allowed Langer for the time he was about the Court in the criminal case."

Lange, for the appellant, after reading the record, referred to the reasons given by the Magistrate, who had considered that there was insufficient reason for the criminal proceedings, but did not hold that there was an absence of reasonable and probable cause. He contended that the evidence in the criminal case, which he read, shewed that such cause existed, and that the presumption of legal malice was swept away by the manner in which the appellant gave his evidence, both on affidavit and in Court.

There was no appearance on behalf of the respondent.

Cur. adv. vult.

Postea (May 28),—

JONES, J., said:—This is an appeal from the decision of the Additional Resident Magistrate for Kimberley District sitting in the Court at Dutoitspan. The plaintiff (now respondent) sued the defendant (now appellant) for the sum of £50, damages alleged to have been sustained by the plaintiff by reason of the defendant having falsely and

maliciously and without reasonable or probable cause appeared before a Justice of the Peace and charged him with the crimes of malicious injury to property and theft, in consequence of which the plaintiff was summoned before the Additional Resident Magistrate of Dutoitspan to undergo a preliminary examination. After hearing the evidence adduced on the criminal charges, the Assistant Resident Magistrate of Dutoitspan dismissed the case. Hence the present action by the plaintiff for damages. In the Court below the judgment was given for £15 and costs of suit. Against this judgment the defendant Easter now appeals. The facts of the case are shortly these:—On the 3rd of November 1883, one Edwards was the owner of a certain stand (2403) in Beaconsfield, and borrowed money from the appellant Easter. On this stand stood certain buildings. As security for money lent, the stand and buildings were sold (it is said) and transferred to Easter. Langer was living in one of the houses at this time, and Easter consequently informed him of the purchase. Notice was given to Langer to remove and, as he did not comply with the formal request conveyed to him, an action was commenced in the High Court (which I know was undefended) and eventually, about the 3rd of March last, a judgment for ejectionment of Langer and delivery of possession to Easter was delivered. In one of the houses—an iron building brick lined—there was a brick partition. On the 3rd of March, Langer went to the house in an excited state, knocked down this brick partition, a good deal of the brick lining, took a door from the partition he had knocked down, went into the stable, knocked down the manger, carried off a door from the w.c., and a glass door which he took down from the brick house in which at the time he was living. Next day he left the place altogether, carrying off the manger and the doors with him. Another person was charged at the same time as Langer, viz., one Elliott. It appears that on the 5th March he took away a plain door stating it was his. On the 9th March, Langer seems to have used some strong language, saying it was a pity that a certain wagon had been standing against the iron house, or he would have put a charge of dynamite into it and blown

1884.
May 20.
" 28.
Easter vs.
Langer.

1884.
May 20.
" 28
Easter vs
Langer.

the house up. These are the facts alleged in the affidavit of the witness Wilhelmina Rubling. Easter makes an affidavit, but states most of his facts to be based upon information he has received and repeats most of what has been already extracted from Rubling's affidavit, as being something which he has heard. Another witness, James Bayliss, states that he visited the house on the 8th March, taking with him the keys, and found the property already mentioned missing. These three affidavits were sworn to on the 11th March, and upon them a summons was issued. A preliminary examination was commenced and after hearing the witnesses the Magistrate discharged the prisoners Langer and Elliott, apparently holding that there was no *mens rea*, and that the proper remedy of Easter was by civil action, and that Langer and Elliott were not criminally liable, as they were acting upon what they rightly or wrongly believed to be their civil rights. No doubt in this decision the Magistrate was right, as no jury would convict when it was shewn to them that the prisoners were acting under a mistaken notion of their legal rights in taking possession of the property of another. In the civil action for malicious prosecution the Resident Magistrate had to decide quite different points; he had to decide that the defendant Easter had no reasonable or probable cause in making the charges of theft and malicious destruction of property, and that the charge was maliciously made. In order to maintain an action for malicious prosecution the plaintiff must shew that there was (1) an absence of reasonable and probable cause for instituting the prosecution; (2) malice in instituting the criminal proceedings; (3) the existence of the prosecution, and (4) the termination of the criminal proceedings in favour of the plaintiff. In the case before us the two last requisites are shewn in evidence. The only remaining questions are as to the two first. It is true that where there is an absence of reasonable and probable cause a jury may infer malice, and proof of their absence may be considered as *prima facie* evidence of malice; "but this is an inference not of *law* but of *fact*, which the jury are not *bound* to draw;" and if a Judge presented to a jury the absence of probable cause as conclusive evidence of legal malice it would be a

misdirection (*vide Chitty's Precedents of Pleading*, 3rd Ed., p. 599). The Magistrate seems to find as a fact that the facts *would not support a criminal prosecution*; but in my opinion what he had really to find was something more, *viz.*, that the facts which the defendant had before him were not such as would lead him to suppose that the accused Langer had been guilty of the crimes laid to his charge, and, secondly, that in making the charge and instituting legal proceedings he was actuated by malice. The facts which were shewn to have been known to the appellant would lead one to suppose that he had some reasonable grounds for believing the respondent guilty of the crimes charged. Of his own knowledge he knew but little, but before the charge was made he had strong affidavits of fact before him. In the cases of *Murtha vs. Allen* and *Murtha vs. Laing*, heard in the Appellate Court, and reported in *Buch. C. A.*, Part II, p. 140, there was strong evidence of malice, but the CHIEF JUSTICE, in considering the question of reasonable and probable cause, said his difficulty was in holding that the charge was entirely false, and that there was a want of reasonable and probable cause. "It could not be lost sight of that Murtha when he instituted these prosecutions was fortified by affidavits of Halifax and other persons who were qualified to give opinions." The person who actually institutes legal proceedings has not always the facts within his own knowledge, and if he is deceived after *bonâ fide* inquiry he cannot be said fairly to have acted without reasonable and probable cause. No express malice was proved, and the Magistrate therefore, had he been justified in finding that no reasonable or probable cause existed, could as a juror have, from these facts, inferred the existence of malice; but instead of doing so he finds that the defendant (Easter) had been made a tool of by Mr. Edwards, "who bore the malice," and that "any one in Court during the hearing of the case must have been struck by the intense animosity displayed by Edwards against Langer;" "I had no doubt the proceedings were instigated," says the Magistrate, in giving his reasons for his judgment, "by Edwards, who remained in the background and gave evidence in neither the criminal nor the civil case." He

1884.
May 20.
" 28.
Easter vs.
Langer

1884.
May 20.
" 28.
Easter vs.
Langer.

further finds that the "affidavits upon which the criminal charge was founded were drawn up by Edwards, who intended Langer should be arrested." The Magistrate has not inferred from the absence of what he holds to be a reasonable and probable cause that Easter's conduct was malicious or that he was actuated by malicious motives; but he has found that Easter has been a mere tool—probably deceived by the affidavits drawn up by Edwards—and that in consequence he has laid a criminal charge which cannot legally be substantiated. Where a man, without malice and *bonâ fide* believing in evidence laid before him,—evidence which if true and uncontradicted and unexplained would substantiate a criminal charge—is induced to lay a criminal charge against another by a person who has malicious feelings prompting him to take advantage of the ignorance of his dupe, it would, I think, be a dangerous principle of law to lay down that damages may be recovered against him for malicious prosecution. The view which the Court has taken, upon the whole of the circumstances of this case, is that the Magistrate should have given absolution from the instance in the Court below. And as to the question of costs, both here and in the Court below, the Court does not consider that the appellant has shewn himself entitled to his costs as against the respondent. The conduct of the defendant Easter in charging the plaintiff Langer with two serious crimes appears to have been unnecessarily hasty and injudicious, and on the other hand Langer acted in a most unjustifiable manner in removing what was apparently the property of Easter after the latter had obtained a judgment of ejectment in this Court. Therefore, though the Court now varies the decision of the Magistrate, it will order each party to pay his own costs, both in this Court and the Court below.

LAURENCE, J.:—I have felt a good deal of difficulty about this case, and have been anxious if possible to see my way to confirm the judgment of the Magistrate. While on the one hand, in actions for malicious prosecution, the malice must be proved before the plaintiff can recover, on the other, the habit, of which a good many illustrations

come before us here, of hastily and recklessly instituting criminal proceedings on inadequate grounds is one much to be deprecated, and I have no sympathy with persons who suffer in their pockets for bringing unfounded charges affecting the character and reputation of others. I think that in dealing with a case of this kind we should put ourselves very much in the position of a Judge directing a jury in one of these actions at *nisi prius*. It is for the Judge to decide whether there is evidence of absence of reasonable and probable cause to go to the jury; it is then for the jury to say if they are satisfied on the evidence that there was such absence, and moreover such an entire absence as to amount in law to malice, if express malice is not otherwise proved. Similarly, if an Appellate Court is of opinion that there was evidence of absence of reasonable and probable cause to go to the Magistrate, as judge of the facts, I think we should be very reluctant to disturb his finding on those facts. On the whole, I think that in the present case, as to one part of the charge, there was some slight evidence before the Magistrate which might go to support a judgment for the plaintiff. As to the charge of malicious injury to property, considering the facts as they appear on the criminal record, it appears to me that there was no evidence of malice or absence of reasonable and probable cause in the action taken by Easter in support of the prosecution. But as to the charge of theft the case is different; and although Langer's conduct in taking away the fixtures was extremely reprehensible, I think Easter should have recognised that it was not the conduct of a thief. The difficulty, however, is that the Magistrate has given the reasons for his judgment, and it does not appear from those reasons that he found that the defendant had been actuated by malice. What he says is, not that there was such an entire absence of reasonable and probable cause as to amount to malice, but merely that he was of opinion that the criminal proceedings had been taken on "insufficient grounds." It does not necessarily follow because the grounds of a prosecution were insufficient that therefore the prosecution was malicious. In point of fact, the Magistrate appears to have considered that the malice was on the part not of Easter but of Edwards, who

1884.
May 20.
" 25.
Easter vs
Langer.

1884.
May 20.
" 28.
Easter vs.
Langer.

was not before the Court, and who, he considered, had made Easter his tool. On the whole, I cannot see that there was anything false or directly malicious either in the affidavit sworn by Easter or in the oral evidence he gave before the Assistant Magistrate at the preliminary examination. I therefore on the whole concur in thinking that the judgment in the plaintiff's favour cannot stand, but must be altered into one of absolution from the instance. As to costs, the conduct of both parties was very much open to blame. Langer deserves censure for his violent and tortious conduct in injuring the property and removing the fixtures, Easter for his undue haste in prosecuting, or lending his assistance to, a criminal charge unwarranted by the facts. I think, therefore, that there should be absolution, but without costs, and that there should be no order as to the costs of this appeal.

[Appellant's Attorney, RHODES.]

QUEEN vs. WOLFF.

Act 4, 1883, § 35.

The Board of Management of a Hospital is not a "householder" within the meaning of sect. 35 of the Public Health Act, 1883. The resident surgeon of a Hospital having been convicted of contravening the said section by failing to report the occurrence of certain cases of infectious disease within the Hospital to the Hospital Board of Management "in their capacity as householders of the said hospital;" Held, on appeal, that both summons and conviction must be quashed.

1884.
May 20.
" 21.
Queen vs. Wolff.

Henry Albert Wolff, a medical practitioner and acting resident surgeon at the Kimberley Hospital, was charged before the Resident Magistrate of Kimberley with the crime of contravening sect. 35 of the Public Health Act, Act No. 4 of 1883, in that "on or about the 19th day of February, 1884, he did wrongfully and unlawfully fail and neglect to inform the Hospital Board of Management, in their capacity

as householders of the said Hospital, of the infectious nature of a disease from which two patients in the native ward of the said hospital under his attendance were suffering, and proclaimed by Government Proclamation 186 of November 1, 1883, as small-pox." The defendant denied that the disease from which the natives were suffering was small-pox, and very voluminous evidence, both for the Crown and for the defence, was adduced before the Magistrate, principally with reference to the nature of the disease, as to which there had been a considerable conflict of opinion among medical practitioners as well as among the general public. In the end the Magistrate, who delivered a written judgment, found that the cases in question were cases of the disease which had been declared by Government Proclamation to be small-pox, and which, as a matter of fact, he found was small-pox. He also held that the defendant was wrong in his contention that he was entitled to treat these cases in the hospital, and referred on this point to sects. 37 and 39 of the Act. He found that the defendant was aware of the nature of the disease, and that it was his duty to have reported the cases to "the Hospital Board, who stood in the light of householders to him." He accordingly convicted the defendant, and sentenced him to pay a fine of £10. The defendant appealed.

The appellant, who appeared in person, referred to the form of the charge, and observed that Proclamation 186 of 1883 had not declared small-pox to exist here; it merely recited that "small-pox has broken out in the Transvaal, and the Territory of Griqualand West is threatened with the disease from that State." [THE COURT observed that there was no necessity for the existence of small-pox in the District to be proclaimed before the provisions of Section 35 could apply; the section referred to "small-pox or any other disease declared by the Governor to be infectious."] He further contended that under sect. 39 of the Act he was justified in treating in the Hospital cases of infectious disease, and on this point referred to the Hospital Regulations. [LAURENCE, J.:—Under sect. 37 of the Act, it would appear that infectious cases can only be removed to a public hospital by order of the Resident Magistrate or a

1884.
May 20.
" 21.

Queen vs. Wolff.

1884.
May 20.
" 21.
Queen vs. Wolff.

Justice of the Peace, and "with the consent of the superintending body of such hospital."] He argued that the word "householders" in sect. 35 of the Act did not apply to the governing body of a Hospital.

JONES, J. :—Are you the householder of the Hospital or a medical practitioner in attendance?

Appellant :—I am not the householder, but the powers of a householder were delegated to me as Resident Surgeon.

LAURENCE, J. :—The charge against you is that, in your capacity as Resident Surgeon, you neglected to inform the householders of the Hospital of the nature of the disease under treatment.

JONES, J. :—How is it shewn that the Board of Management were the householders of the Hospital?

Appellant :—The only evidence on that point was that of the Civil Commissioner, who was Chairman of the Hospital Board, and who stated that the Hospital was under the management of the Board. Another ground of appeal, and that on which I mainly wish to rely, is that the judgment was against the weight of evidence as to the nature of the disease.

THE COURT, before the appellant went into the merits, wished to hear the *Crown Prosecutor*, who appeared to support the conviction, on the question whether the "Board of Management" referred to in the charge were "householders" within the meaning of sect. 35, so as to render it the duty of the defendant, as medical practitioner in attendance, to report to them the infectious nature of the disease.

Hoskyns, C. P., contended that the word "householder" must in the case of a hospital include the Board of Management, and in a case of this kind should receive a liberal construction. He referred to the Regulations under the

Public Health Act, published in the *Government Gazette* of January 25, 1884. The Board had the whole control and management of the Hospital, and it was clearly the duty of the Resident Surgeon to inform them of any outbreak of infectious disease. He referred to *Maxwell on the Interpretation of Statutes*, pp. 50, 51, 60, as to the meaning of "occupier;" *ibid*, pp. 239, 247, 249, as to the construction of penal statutes, as to which he argued that the degree of strictness in construction depended to some extent on the severity or otherwise of the penalty for the offence in question. If the present case were not that of a public hospital, but of an asylum for orphans or lunatics, there would be a clear duty to report to the householder, who in the case of public institutions must be taken to be the superintending body or board.

1884.
May 20.
" 21.

Queen vs. Wolff.

JONES, J.:—The only point which the Court has to decide in this case is whether the charge, as laid against Dr. Wolff, was a good one or not; of course the Court must confine itself to the charge as it appears on record. The appellant was charged with wrongfully and unlawfully failing and neglecting to report to the Hospital Board, in their capacity as householders of the Hospital, the infectious nature of a certain disease, alleged to have been small-pox, which had broken out within the Hospital. He was charged under the 35th section of the Public Health Act, 1883, which runs as follows:—"When any householder knows that a person within the house occupied by him is suffering from small-pox or any other disease declared by the Governor to be infectious, he shall immediately give notice thereof to the local authority of the place on (*sic*) which he dwells. It shall be the duty of the medical practitioner in attendance in such case to inform the householder as early as possible of the infectious nature of the disease. Any person neglecting or refusing to comply with the provisions of this section, shall be liable to a penalty not exceeding £10." With the exact position which Dr. Wolff held with reference to the Hospital Board the Court has not now to deal; but as a matter of fact, his position was that of Acting Resident Surgeon to the Hospital, and we find from the rules that the Resident

1884.
May 20.
„ 21.

Queen vs. Wolff.

Surgeon has to exercise supervision in the matter of refusing or admitting patients to the institution. Then the question arises, was this section intended to apply to a person in the position of Dr. Wolff and, if so, can it be said that the Board of Management of a Hospital are “householders” within the meaning of the section? The term “householder” is one that has given rise to much discussion on various occasions, and special enactments—such as the clauses creating the “service franchise” in the new English Franchise Bill, to which my brother LAURENCE referred during the argument of the *Crown Prosecutor*—have been passed to obviate difficulties which have arisen in regard to this very point. For myself, I cannot believe that the Legislature meant to extend the meaning of the term “householder” in the Act before us to such cases as that of a Hospital Board of Management. Putting the widest possible construction on the intention of the Legislature, I still think that the section was simply meant to apply to cases where infectious disease had broken out in a private house. If any person was “householder” of the Hospital, it seems to me that it was the Resident Surgeon, Dr. Wolff. On these grounds I am of opinion that the summons in the present case failed to disclose any offence against the section, and the summons and conviction must therefore be quashed.

LAURENCE, J.:—The preliminary objection taken by the appellant in this case is that, while he has been charged with and convicted of contravening sect. 35 of the Public Health Act, by not reporting an outbreak of small-pox in the Kimberley Hospital to the Hospital Board of Management, “in their capacity as householders of the said hospital,” the Board of Management are not “householders” within the meaning of the section. I concur in thinking that this objection is fatal to the conviction. In the interpretation clause of this Act, sect. 2, there is nothing to give the word “householder” such an extended meaning as would include the Board of Management of a Hospital. In other Acts, such as the English Acts for the Better Representation of the People, where the meaning of the word is very carefully defined, we find no definition which would cover such

a body ; neither is anything of the kind to be found in the definition in such a work as *Wharton's Law Lexicon*, or, in my opinion, in the common and popular acceptance and significance of the word. Moreover, when we look at the section now in question, it seems clearly to be intended to provide for cases of infectious disease breaking out in private dwellings, and for those cases alone. It lays down "the duty of the medical practitioner in attendance in such case to inform the householder"—that is, as I take it, the responsible occupier of the house—"as early as possible of the infectious nature of the disease," in order that the latter may immediately give the requisite notice to the proper local authority. The treatment of infectious diseases in hospitals is provided for by sects. 37 and 39, which are not now before us. The principal argument on behalf of the Crown has been that unless the word "householder" in this section includes a hospital board, the resident surgeon of a hospital, on infectious disease breaking out among the patients under his supervision, might neglect with impunity his duty to inform the Board of Management of so serious an event, and that this clearly could not have been the intention of the Legislature in framing this Act. But the answer to this seems to be very simple. The Legislature made no special provision for such a contingency, as they could scarcely have foreseen the possibility of its arising. The Legislature can scarcely have contemplated that any person in the position of the appellant, having the medical superintendence of a hospital, would be so neglectful of his obvious duty as to fail to report a case of a dangerous and infectious disease breaking out in such a place as the general wards of a public hospital. If the disease were small-pox—or a disease of such a nature that, whatever his own private opinion, he knew that some of his experienced fellow practitioners regarded the symptoms as being those of small-pox—the duty of the medical attendant in such circumstances would be so apparent that there could scarcely seem any necessity for the Legislature to make special provision for its performance. Were a person in such a responsible position to ignore or neglect his duty in that respect, and if in consequence the infection spread and fatal results ensued, a much

1884.
May 20.
" 21.

Queen vs. Wolff.

1884.
May 20.
" 21.

Queen vs. Wolff.

more serious charge than that of breach of a statutory regulation, involving a £10 fine, might be brought against him, and there might be very good grounds for an indictment for culpable homicide. I agree in thinking that the present proceedings have been misconceived, and that both summons and conviction must be quashed.

JONES, J., added that it seemed to him strange, if the rules and regulations of the hospital were observed, that the existence of this disease, whether it was small-pox or some other disease of an infectious nature, was not discovered by the consulting medical officers of the Hospital Board.

SAUER vs. RADFORD AND ROPER.

Libel.—Apology and tender.—Measure of damages.

Where a newspaper had published the report of a speech containing libellous reflections on the professional conduct of the plaintiff, a medical man, and the publishers had subsequently published an apology and tendered the sum of £20 as damages for the publication, and there was no proof of express malice, or of special damage suffered by the plaintiff: Held, that the amount tendered, together with the apology, was sufficient, and that the plaintiff must have judgment for that amount, but must pay all costs incurred subsequent to the tender.

1884.
May 21.

Sauer vs.
Radford and
Roper.

This was an action of libel in which the plaintiff, a medical practitioner at Kimberley, and medical officer of the Board of Health for the district of Kimberley, claimed the *amende honorable* and £1000 damages. The defendants, the printers and publishers of the *Diamond Fields Advertiser*, a newspaper published at Kimberley, had published a report of a speech made by Dr. Wolff, another medical practitioner at Kimberley, at a complimentary dinner which had been given to him, and which contained the libel complained of. There had been a great controversy on the diamond fields as to whether a certain epidemic which had been prevalent

there was small-pox or not, Dr. Wolff, the acting resident surgeon of the Kimberley Hospital, denying that it was small-pox, while the Board of Health and its medical officer had treated it as such. Professional as well as general opinion on the subject it appeared had been much divided, Dr. Wolff had been prosecuted for contravening the Public Health Act (see *Queen vs. Wolff*, *supra*, p. 512), and a great deal of feeling had been displayed on both sides. The passages in the speech principally complained of by the plaintiff as libellous were the following:—"The control of the hospital had been taken out of my hands and put into those of the Chief Cook and Pailwasher of the Board of Health, aided and abetted by an ignorant partizan medical student, whose motto in the whole of this affair seems to have been, 'Get money, honestly if you can, but get it anyhow.' . . . That great medical whang-whang of the Board of Health, or, as Mark Twain might describe him, the illustrious medical grand sachem and bully boy with the glass eye, Dr. Sauer, wanted me prosecuted for culpable homicide . . . No doubt the silly performances of these small-pox medical men excited a good deal of fear and apprehension . . . They were determined to stick to small-pox at any price, whether it was really small-pox or not (a voice: 'As long as the money lasted!')." The plaintiff alleged that the libel meant that he was not a duly qualified medical practitioner, that he had been guilty of gross professional misconduct, that he was ignorant of his profession, that he had falsely represented certain persons to be suffering from small-pox for the purpose of receiving reward for the medical treatment of such persons, and of obtaining his appointment as medical officer to the Board of Health, whereas, in truth and in fact, the said persons were not suffering from the said disease, as the plaintiff well knew, and that he had otherwise misconducted himself in the discharge of his profession and duties as aforesaid, whereby the plaintiff had been greatly injured in his credit and reputation, and had been held up to public hatred, contempt and ridicule. The defendants admitted the publication of the report complained of, but said the publication was made *bonâ fide*, without malice, and on a matter of public interest. They denied the innuendoes

1884.
May 21.
—
Sauer vs.
Radford and
Roper.

1884.
May 21.
—
Sauer vs.
Radford and
Roper.

alleged, and further pleaded that they had tendered to the plaintiff the sum of £20, together with his costs of suit, and had also offered to publish an ample apology. After the tender was refused they had published the apology, which was inserted in the plea, and they now brought into Court the sum of £20 in satisfaction of the plaintiff's claim. The plaintiff admitted the tender and the publication of the apology, but said that the former was insufficient. The publication, the libel, and the tender, being thus admitted, the sufficiency of the tender was really the only matter in issue. The only witness called was the plaintiff, who deposed to his medical qualifications, and to the facts that the libel referred to himself, that it bore the meaning alleged, and that the insinuations, that he had been guilty of professional misconduct and actuated in his proceedings by mercenary motives, were totally false. He considered the apology insufficient, and wished to vindicate his character, and obtain compensation for the serious injury in his profession which he considered he had sustained. He could not give any special instance of loss which he had suffered in consequence of the publication, as he was only just beginning to practise at Kimberley; he did not dispute the correctness of the report of the speech.

Hoskyns, C. P. (with him *Forster*), for the plaintiff, contended that the tender was insufficient, and referred to *Folkard on Slander and Libel*, 4th ed., p. 399, and cases there cited. The delay in publishing the apology, which did not appear till more than a fortnight after the libel, should aggravate the damages; *Smith vs. Harrison*, 1 F. and F., 565. The injury done by a publication of this kind to a young medical man just commencing practice must inevitably be very great, and substantial damages was the only compensation.

Lord, Q.C. (with him *Hopley*), for the defendants, referred to the proceedings taken by the plaintiff after the publication, which he condemned as hasty and intemperate, and to the correspondence which had passed between the parties. There was no evidence of actual malice, or that the plaintiff had suffered any real damage. He contended that the

apology which had been published was an ample one, and the plaintiff should have accepted the tender. As to the measure of damages in cases of this kind, he cited *Odgers on Libel and Slander*, 300; *Purcell vs. Sowler*, 1 C. P. D. 781, 46 L. J. C. P. 308; *Jones vs. Mackie*, L. R. 3 Ex. 1; *Harnett vs. Vise*, 5 Ex. D. 307; *Uppington vs. Solomon & Co.*, Buch. S. C. 1879, 204; *Uppington vs. Dormer*, *ibid*, 240; *Hofmeyr vs. Stigant*, *ibid*, 95; *Payne vs. Sheffield*, 2 Buch. E. D. C. 166; *Bruce vs. Callaghan*, *ibid*, 259.

Hoskyns, C. P., replied.

JONES, J.:—In this case Dr. Sauer sues the defendants for the sum of £1000 damages and costs of suit, for wilfully and maliciously publishing in the *Diamond Fields Advertiser* a false and untrue libel concerning the plaintiff. The defendants contend that they published the matter complained of in the public interest, and that the sum of £20 as tendered by them is quite sufficient compensation for any injury sustained by the plaintiff. Now it appears the whole of these unfortunate cases have arisen out of a difference of opinion between a number of professional men, as to whether a certain disease was small-pox or something else. With this question the Court has not now to deal. Dr. Wolff was tried by the Resident Magistrate of Kimberley for a contravention of the Public Health Act in not reporting a case of alleged small-pox to the Board of Management of the Kimberley Hospital. The Magistrate reserved judgment, but before it was actually delivered the admiring friends of Dr. Wolff gave him a complimentary dinner at the Dutoitspan Club. At this dinner, in the heat of the moment, and under the influence of the excitement which prevailed at the time, certain speeches of an unjustifiable character were delivered by those present, speeches which could not be admired by any, except perhaps those whose sympathy for the Doctor had carried them away. The effect of these speeches, and especially that of Dr. Wolff, which was interlarded with comic anecdotes, was certainly to cause a laugh; but I do not think that they could much injure the reputation of Dr. Sauer, or any of those who agreed with his views, from a professional point of view. This is the view which would

1884.
May 21.
—
Sauer vs.
Radford and
Roper.

1884.
May 21
—
Sauer vs.
Radford and
Roper.

certainly be taken by most people who read the speech. Dr. Sauer occupied a public position as the medical officer of the Board of Health, and as such he would often have to bear adverse criticism of his public acts, but as long as this criticism was fair and *bonâ fide*, and attributed no motives of a dishonest character to himself individually, he could not recover damages; but when the critic stepped out of his way to make unjustifiable attacks and impugn his motives, and charge him with dishonesty, he could recover such damages as would re-instate him pecuniarily for whatever he could shew that he had lost by such an attack, and when the damage sustained had been the result of an act expressly malicious, the amount should be substantial, and in some cases exemplary. "Public affairs and public men" (as Lord Coleridge says in delivering judgment in the case of the *Earl of Lonsdale vs. Yates*) "using the expression 'public' in its largest possible sense, literature, art, science, religion, the catalogue might be indefinitely extended, these things are fair and lawful topics of discussion in the press, and these may be freely discussed, and I hope discussion of them will always be practically and absolutely unfettered. But when we come to private matters very different considerations obviously arise. Public men in England must submit to public comment as one of the necessary ingredients of their career." But when public men are criticised, the criticism must be fair and *bonâ fide*, though the attack may be severe and give pain, and shew too much heat. In the case before the Court we have not a case like that of the *Earl of Lonsdale vs. Yates*. The Court have no reason to think, and it was not suggested by the learned counsel for the plaintiff, that this paper is a paper which lives on the publication of personalities. It cannot be said that it is not a paper of "high aim and public usefulness, committing a breach of the law inconsistent with its general conduct and character." But in publishing the report of Dr. Wolff's speech, a speech which contained remarks in themselves libellous in the eye of the law, which might bring the plaintiff into ridicule, they have committed a mistake of a grave character. That which has been published is a libel on the plaintiff, and for this libel he is entitled to some pecuniary recompense, if he

demands it. The only real question which is left for the Court to consider is what amount of damages we must give. The defendants have all along expressed a desire to reinstate the plaintiff in the eyes of the public for any injury he may have sustained. I think it greatly to be regretted that Dr. Sauer took so much notice of the reports of these speeches. It is better for men holding public positions to treat such matters with the silent contempt they deserve rather than by seeking to obtain a remedy in the Courts of Justice, for very frequently when an action is brought to obtain damages the public mistake the intention of the Court in awarding what is by it considered sufficient compensation. When a civil action is brought for slander the Court has to consider simply the damage which has been sustained, and not give, unless there are very good grounds for doing so, vindictive or exemplary damages. I think, myself, there is no evidence given of any particular damage having been sustained by the plaintiff; the Court can only give an amount which they think he has sustained. I not think that speech of Dr. Wolff injured him so much, it was probably more laughed at than considered as a serious charge of professional misconduct. There is certainly no damage which could be deemed so great as to warrant the Court in giving vindictive or exemplary damages. The utterances complained of were at a public dinner, and these, as a rule, did very little damage when read calmly by persons who were not in the same heated or excited condition, or under the same influences. I cannot say that I approve of the course adopted by the plaintiff's attorneys in this case. There seems to have been undue haste in instituting the action. They allowed no time whatever to admit of the defendants reinstating their client, and not even the ordinary letter of demand was sent; and certainly when an attempt was made by Mr. Radford to bring this matter to an amicable conclusion, instead of making it the subject of a law-suit, it was only their duty to see that that object should have been carried out. Now I do not think that the apology which was offered could fairly be considered "a lame and halting apology." No private individual is called upon to assume an abject position when he tenders an apology; it is not necessary

1884.
May 21.
—
Sauer vs.
Radford and
Roper.

1884.
May 21.
—
Sauer vs.
Radford and
Roper.

that an apology should be abject ; but that it should be full and ample admits of no doubt. Certainly the one tendered in the present case was late in making its appearance. Looking at all the circumstances of the case, I do not think the defendants were actuated by express malice ; there was legal malice, of course, for which they, as the repeaters of the libel, were liable, but no express malice. Under these circumstances I think the amount tendered by the defendants is sufficient. I think judgment should be for plaintiff, but without the unnecessary costs incurred, *i.e.*, the judgment will be for the plaintiff for the amount tendered by the defendants, viz., £20, with costs up to date of tender, but the plaintiff will have to pay all the costs of suit after that date.

LAURENCE, J.:—In this case the issue which the Court has to try is a very narrow one. The publication complained of is admitted by the defendants, and the libel is also admitted. The innuendoes as laid in the declaration are not admitted ; but the plaintiff gave evidence that the meaning of the words was that assigned to them, and that they referred to himself, and he was not cross-examined on the point ; no evidence was adduced to the contrary ; and at all events it is admitted that, whatever the precise meaning of the words, they are of a libellous character. On the other hand, the plaintiff admits the tender of £20, with costs to date of tender, and the publication of the apology, as pleaded by the defendants ; and therefore the sole question we have to determine is whether the tender is a sufficient answer to the claim for damages, and the published apology a sufficient answer to the claim for the *amende honorable*. By the form of the replication it may be said that the latter is technically admitted, and thus the question is substantially one of damages alone. I may here remark that I do not think the description by the plaintiff's attorneys of the apology as a "lame and halting" one was in any way warranted by the expressions it contains. The defendants say, in effect, "we unreservedly withdraw all imputations on either the private or the professional character of Dr. Sauer, and we deeply regret that we should have inadvertently

allowed our columns to become the channel of publicity for these attacks;" and this statement is published in the most prominent portion of their paper. Now the whole of this unfortunate litigation has arisen out of a certain speech made by Dr. Wolff, at a complimentary dinner given to him at Dutoitspan on April 22nd, and published by the defendants on April 24th, and republished in their weekly summary for England on April 26th. It is not alleged that the report as published was garbled or in any way other than correct. The speech, however, is one which I must say—making all possible allowance for the circumstances of the moment—I think it is much to be regretted should ever have been made. In the first place, it was mainly occupied with dealing, in a very one-sided and intemperate manner, with a case which was then *sub iudice*, and on which it was anticipated that judgment would be delivered on the following day. It is not to be supposed that anything Dr. Wolff, in a moment of convivial excitement, might think fit to say could possibly affect the judgment of the Magistrate in the slightest degree, one way or the other; but the observations which he made were none the less improper on that account. Moreover, if the report of the speeches is correct, and if the innuendoes as laid in this action are correct—I do not now think it necessary to express an opinion on that point—Dr. Wolff was guilty of a most grossly offensive attack on one of his colleagues, an attack which, if the medical profession is like other learned professions, and possesses any sort of *esprit de corps*, I should think and hope would be repudiated by all the Doctor's fellow-practitioners, as being entirely contrary to the traditions and unworthy of the character of a great and honourable profession. Dr. Wolff, it is said, charged Dr. Sauer, firstly, with practising as a medical man without possessing the necessary qualification, thereby rendering himself liable to penalties under the medical Ordinance; secondly, with being actuated in his professional conduct by dishonest, vile and mercenary motives. If this was the real meaning and natural significance of the Doctor's words, all that I can say is that the charges are of the most serious nature, the language is highly actionable, and would afford strong evidence of such express malice as

1884.
May 21.
—
Sauer vs.
Radford and
Roper.

1884.
May 21.
—
Sauer vs.
Radford and
Roper.

would greatly aggravate the damages. But we are not now considering the conduct of Dr. Wolff; we are considering that of the defendants, and the responsibility which they have incurred by publishing these charges. I can well understand the legitimate indignation felt by the plaintiff on hearing of these remarks or reading them in the defendants' newspaper, and I am not surprised to hear that he has brought an action against Dr. Wolff for these alleged slanders. I do not, however, wish to be understood, by the remarks I have made, as in any way encouraging the prosecution of such an action; I doubt very much whether the plaintiff or anybody else would gain any advantage from further litigation about this matter, and whether it would not be a far better and more dignified course to leave unnoticed and treat with silent contempt accusations which, as far as the evidence now before us goes, seem to refute themselves by their transparent mendacity. However, the plaintiff may well have thought that, if he took no action whatever when these calumnious attacks were published and circulated in the local press, his passivity might be open to misconstruction; and I am not surprised, therefore, that he should have sought redress for the injury he undoubtedly had sustained. But in dealing with the liability of the defendants, as distinguished from that of Dr. Wolff, I am bound to say that I find no evidence whatever of express malice on their part. The defendant Radford, it is admitted, had previously been on friendly terms with the plaintiff, and it is not suggested that he had any deliberate intention of doing him an injury. It is said that, as before this speech was published the Magistrate had delivered his judgment in the case of *Regina vs. Wolff*, and convicted the accused, that is some evidence of express malice on the part of the defendants in publishing statements of which the judgment of the Magistrate supplied the refutation. If the defendants had published the speech and omitted the judgment, there might have been some force in this remark; but in point of fact we find that the same issue which contained the speech contained an equally full and prominent report of the Magistrate's judgment, and thus, so to speak, if the defendants supplied the poison, they also took care to

provide the antidote. That there was legal malice on the part of the defendants is not denied, but I am not prepared to say that there was such gross negligence on their part as—on the principle *magna culpa est dolus*—to amount to express malice. That there was a certain amount of carelessness on their part, for which they will have to suffer, there can be no doubt. It is not as if this speech had been published the morning after its delivery, with little or no opportunity of considering the reporter's notes and revising the proofs; there was ample time, in the course of the day which elapsed before the publication, to eliminate the libellous passages. It is said that Mr. Stow, one of the plaintiff's attorneys, gave the defendants a warning previous to the publication; but this is mere hearsay, and if the Court was to be asked to take this allegation into consideration, on the question of malice, Mr. Stow should have been called to prove it. However, the plaintiff tells us, and his evidence is not contradicted, that Mr. Radford informed him afterwards that he had read the speech through three times and "could not see where the libel came in." If that be so, all I can say is that Mr. Radford's capacity for detecting libel must certainly be somewhat deficient; and he would do well in future—if he wishes to conduct his paper with safety, not to say with credit—to endeavour to cultivate a more acute scent for such matters, or else to employ the services of an editor whose capacity for discovering libellous matter may be more highly developed than his own. It must, however, be borne in mind that the subject of this speech was certainly one of much public interest and importance. The subject was what is known as "the small-pox controversy"—the question, which had greatly exercised the minds both of the medical profession and of laymen, whether a certain disease which had broken out on the Diamond Fields was really small-pox or another disease of a different character, and the treatment of which did not require such precautions to be taken, in the interests of the public health, as would be rendered essential by epidemic small-pox. A public dinner was given to Dr. Wolff, who seems to have taken a leading part in this controversy; reporters were present, and a report of the proceedings would be expected. It may be said that

1884.
May 21.
Sauer vs.
Radford and
Roper.

1884
May 21
—
Sauer vs.
Radford and
Reper.

the reporting of such matters is a duty which the press owes to the public. But this is a duty which involves no privilege; the occasion was not privileged; and a newspaper as such enjoys no special privilege. And therefore the action will lie; but all the circumstances of the case, the nature of the occasion, the absence of express malice, and the absence of evidence of special damage, are matters which the Court must take into account in estimating the damages to which the plaintiff is entitled. I now come to another material point in the case. I mean the subsequent conduct of the parties. The cause of action arose on April 24th. No application for apology or retraction, and no letter of demand, was sent; but two days afterwards, on April 26th, the plaintiff serves the defendants with a summons for the *anecdote honorable* and damages to the amount of £1000. Then without any delay, the summons having been issued on Saturday, April 26th, on the following Tuesday, April 29th, the defendants' attorney writes to the plaintiff's attorneys in the following terms:—"My clients are somewhat surprised that you should have issued summons without previously sending a letter of demand, which would have given them an opportunity of more fully ascertaining your exact cause of complaint, and possibly explaining or removing it. I shall be obliged if you will furnish me with these particulars before incurring any further expense, and by so doing I cannot but think you will advance the interests of my client and your own." I cannot concur in the manner in which this letter has been criticised: it appears to me to have been in the circumstances a very proper and reasonable letter, and its object apparently was, by ascertaining everything that was objected to, to if possible leave no ground uncovered in any explanation or apology which might be made, and so to leave the plaintiff with no cause for dissatisfaction and give him all possible reparation for the wrong that had been done him. The plaintiff's attorneys, however, replied in effect:—"We can't waste time in useless explanations and frivolous correspondence; we are busy making out our statement of claim." This was on April 29th, and the declaration was filed on the following day. A week afterwards the defendants' attorney

again writes, enclosing a form of apology and withdrawal, which appears to me to have been a proper and ample one, and tendering the sum of £20 and costs to date, on behalf of the present defendants, together with similar sums on behalf of the proprietors of two other newspapers, against whom similar proceedings had been taken for the publication of this speech, or £60 in all. The draft apology contained a statement that this sum had been paid and accepted as damages, and, on behalf of the present and other defendants, it was offered to publish it in the form of a leading article. To this the plaintiff's attorneys replied on the following day, describing the proposed apology as "lame and halting," which I do not think was by any means a fair description of it, and adding that "a paltry tender of £20 in each case is simply adding insult to injury." No alteration in the form of apology is suggested; it is not suggested, as it might have been, that it should be published at the defendants' expense in other colonial newspapers; no opportunity whatever for an amicable settlement—which I think it is clear from the tone of the correspondence that, if at all reasonable, the defendants would have been glad to embrace—is afforded. "Pay me £1000, or meet me at Philippi"—such is the gist of the plaintiff's answer; and accordingly we are in Court to-day. The apology was afterwards published, but of course without the statement that the £20 had been paid. The argument of the *Crown Prosecutor* that in this case it would have been useless to adopt the course, almost invariably pursued, of sending a letter of demand before issue of summons, because no mere apology could repair the injury to the plaintiff, is an argument which could be used with almost equal force in almost any action for libel; and I am bound to say I concur in the opinion, which has been already expressed, that the peremptory and uncompromising spirit displayed by the plaintiff's legal advisers in this matter—the determination displayed by them to force the defendants into Court in any event—is matter for regret. There is an almost infinite variety in the circumstances attendant upon actions for libel; and the spirit evinced and the tone adopted by the parties are matters which the Court is bound to take into consideration in awarding damages.

1884.
May 21.
—
Sauer vs.
Radford and
Roper.

1884.
May 21.
Sauer vs.
Radford and
Roper.

In the case of a deliberate false and malicious libel, whether published in a newspaper or anywhere else, I believe there is not a Judge on the Colonial Bench who would hesitate to deal with the offender in a drastic manner, according to the nature and gravity of his offence, whether he be sued for a tort or prosecuted for a crime. On the other hand, we are bound to be careful by our decisions not to interfere with the reasonable liberty of the press in reporting and commenting on matters of public interest and the conduct of public men, a liberty and right the free exercise of which, notwithstanding occasional abuses and aberrations, is undoubtedly for the public benefit. If there is merely a technical libel, an inadvertent, it may be a negligent, publication of libellous matter, and an entire absence of express malice, it is only fair to remember that, as a matter of common sense, the proprietors and editors of newspapers can scarcely be expected to be legal experts. If a newspaper which is generally properly conducted—and there is no suggestion to the contrary in the case before us—falls into an error *bonâ fide*, and afterwards does its best to retract and apologise, and tenders something more than merely nominal damages for the injury unintentionally caused, the case is not one in which the Court would feel justified in awarding exemplary damages. All indeed that we are asked for is substantial damages; but I think it is our duty only to award such damages as the plaintiff on the evidence before us can be fairly held to have sustained. Actions for libel as a class are not, I think, to be encouraged, and their object should be rather to vindicate the character than to fill the pocket. I myself pressed the plaintiff, as he had given no evidence on the point in chief, as to whether he could point to any instance in which either his professional or his private character had been injured by this publication; but he frankly admitted that he could not give any such instance, and no other witnesses were called to prove that anything of the kind had taken place. For myself, I can scarcely believe that Dr. Sauer's private character has really suffered from these scurrilous attacks, or that he has incurred in consequence of them any sort of professional opprobrium or disesteem. These things really refute them-

selves; and I have no doubt that Dr. Sauer will have the opportunity of shewing, by the display of ability in his professional career, how unfounded are the calumnies by which he has been assailed. Each case of this kind must be judged with regard to its special circumstances; and I cannot help thinking that Dr. Sauer would have been better advised, and would have equally effectively cleared himself from these imputations, if he had accepted the offer made by the defendants' attorney. As this offer, in my opinion, was a fair and reasonable one, and ought to have been accepted, I concur in thinking that judgment should be entered for the plaintiff for the sum of £20, with costs up to date of tender, but that he must be ordered to pay the costs subsequently incurred.

1884.
May 21.
—
Sauer vs.
Radford and
Roper

[Plaintiff's Attorneys, STOW & CALDECOTT.
Defendants' Attorney, D. J. HAARHOFF.]

KAUFMANN vs. KIMBERLEY LICENSING COURT.

Licensing Court.—Rule of Court 190.—Review.—Act 28,
1883.—Costs.

F. K. had for five years been licensed to sell liquors on premises which had been licensed for eight years. He became ill and was obliged to go to Europe for his health, leaving his general power of attorney with his brother, J. K., who managed the business until the expiration of the existing licence, and then applied for a renewal in his own name. At the hearing of the application by the Licensing Court, a police officer stated that the place was improperly conducted, and another police officer stated that the accommodation was insufficient. J. K. applied that these statements should be made on oath, but his request was refused. He had no notice of any objections, and it did not appear on the record that any objection was taken. He had no opportunity of replying to, or of calling evidence to contradict the statements by the police officers, which it was alleged were unfounded. On a petition setting forth these facts, the Court granted issue of process in terms of Rule 190. Summons was issued alleging the above irregularities

and served on the members of the Licensing Court, and on the return day the respondents made no appearance and there was no contradiction of the allegations made by the applicant. The Court ordered that the Distributor of Stamps should issue a licence to J. K. similar to the one previously enjoyed for the premises, and ordered the members of the Licensing Court to pay the costs of the application.

1884.
May 23.
June 16.

Kaufmann vs.
Kimberley
Licensing Court.

The applicant prayed for the issue of process, under Rule of Court 190, to be directed against the chairman and members of the Licensing Court, calling on them to shew cause against the setting aside or correcting of their proceedings at the session of that Court on March 6, 1884, on which date the applicant applied in his own name for a renewal of a licence to premises which had enjoyed a licence for eight years, and which his brother had managed as licensed premises for the five years last past, until he was compelled, on account of his health, to make a voyage to Europe, leaving his general power of attorney with the applicant, to manage all his affairs. The application for a licence was refused. The record of the proceedings stated the situation of the premises and the name of the applicant, and further consisted of the following note: "Premises unsuitable for purpose, 36 x 13 divided in centre; improperly conducted place." This conclusion was arrived at upon the statement of a police officer that Sunday trade was carried on in the premises, and that he had once trapped applicant's brother for such contravention of the law, but had been unable to get his trap to swear to it; and upon the further statement by an inspector of police that there was no proper accommodation. The applicant's attorney applied to the Licensing Court that these statements should be taken on oath, but this application was refused. With regard to the statement that the place was improperly conducted, the petitioner stated that during the five years of his brother's management not a single charge had been made against him; and with regard to the other objection he stated that the accommodation was reasonable, and that had he been called upon in terms of sect. 38 of the Act to provide further accommodation, as a

condition precedent to the granting of a licence, he would have done so. He further stated that, owing to the hasty and summary manner in which the proceedings of the Court were conducted, he had no opportunity of rebutting the statements against him, or of cross-examining the police officers, or of tendering the evidence of numerous witnesses on his behalf. At the adjourned session of the Licensing Court on March 26, the petitioner wished to apply for a reconsideration of his application, and to present a numerously signed petition in favour of renewing his licence, but the Court, before his application could be heard, suddenly rose and adjourned *sine die*. The petitioner alleged that the premises were now, in consequence of the action of the Licensing Court, almost valueless, and that he had been deprived of the means of earning a livelihood.

1884.
May 23.
June 16.
Kaufmann vs.
Kimberley
Licensing Court.

THE COURT ordered process to issue under Rule 190, summons, &c., to be returnable on June 16, 1884.

Summons was thereupon issued calling on the members of the said Court to shew cause why their proceedings in the matter should not be set aside or corrected, and a licence granted to the applicant, and why they should not pay costs, on the grounds: (1) that applicant had had no opportunity of being heard or of calling evidence; (2) that no evidence on any objection was taken on oath as required by sect. 40 of the Act, even after application to that effect had been made; (3) that no objections to the granting of the licence were taken either under sect. 46 or sect. 52 of the Act; (4) that no information of any objection was given, as required by sect. 48 of the Act; (5) that the grounds of refusal were insufficient in law and in fact; (6) that the proceedings were irregular and *ultra vires*.

On the 16th June, the respondents, having been duly served with the summons, did not appear.

Davison, for the applicant, relied chiefly on the non-compliance by the Licensing Court with the terms of sect. 40 of the Act, and also pointed out that the grave irregularities alleged in the petition and embodied in the summons were wholly uncontradicted.

1884.
May 23.
June 16.
Kaufmann vs.
Kimberley
Licensing Court.

THE COURT set aside the proceedings of the Licensing Court, and granted an order on the Distributor of Stamps to issue a licence to the applicant in the same form as the one previously held for the same premises, and ordered the respondents to pay the costs.

[Applicant's Attorneys, PALEY & COGHLAN.]

STANDARD BANK OF SOUTH AFRICA vs. D'ESTERRE.

Promissory note.—Exception.—Guarantee.—Liability of committee-man for goods supplied to club.

The trustees of a club made certain promissory notes for goods supplied to the club. The plaintiff, as holder for value of the said notes, sued the defendant, a member of the Managing Committee of the club, for the amount due on the notes, alleging that they were made by the trustees in behalf and under the authority of the Committee, and for goods sold and delivered to the Committee, and that the trustees promised on behalf of the Committee to pay the amounts of the notes to the lawful holder at maturity. Held, on exception, that the declaration disclosed no cause of action against the defendant.

1884.
May 23.
„ 28.
Standard Bank
vs. D'Esterre.

Argument on exceptions. The plaintiff Bank sued the defendant upon certain overdue and dishonoured promissory notes made by the trustees of the Kimberley Club in favour of H. Willigerod & Co., or order, and by the payees endorsed in blank, of which it was alleged that the plaintiff was, and at the date of maturity had been, the lawful holder for valuable consideration. The declaration alleged that “the defendant was one of the Managing Committee of the Kimberley Club, and the promissory notes hereinafter referred to were given on behalf of and under the authority of the said Committee in consideration of goods sold and delivered to the said Committee for the purpose of carrying

out the objects of the said club. The promissory notes referred to in paragraph five hereof were made and signed by the parties whose names they bear at the request of the defendant and on his behalf and under his authority. The trustees of the said club on behalf as aforesaid made and signed the said promissory notes, and thereby they in the said behalf promised to pay the amounts of the said notes to the payees or the lawful holders on maturity thereof." The defendant excepted on the grounds: (1) that the declaration disclosed no cause of action against the defendant; (2) that the promissory notes annexed thereto shewed on the face of them that they were not made and signed as alleged in the declaration; (3) that the declaration was otherwise bad in law and substance.

1884.
May 23.
" 28.
Standard Bank
vs. D'Esterre.

Hoskyns, C. P., in support of the exception:—If the defendant has any liability on these notes, the question whether he is liable as a member of the Committee or merely as a member of the club makes a great difference with regard to his right to contribution. The notes in question purport to have been made by the trustees on behalf of the club, not of the Committee; the plaintiff is suing the agents and not the principal. There is no allegation that the Committee made these arrangements or ordered these goods without authority from the club, or that the Committee were acting as agents for an undisclosed principal. Neither is there any allegation that the debt said to have been incurred by the defendant has been ceded to the Bank, whose rights are merely those of indorsees of the notes.

Lord, Q.C. (with him *Hopley*), for the plaintiff, contended that members of a club possessing a governing body were not liable for goods supplied, but the Managing Committee was liable: *Cullen vs. Duke of Queensberry*, 1 Br. P. C. 404; *Fleming vs. Hector*, 2 M. & W. 172; *Addison on Contracts*, 7th Edition, 104. It is admitted that, on the present declaration, the plaintiff can only sue on the notes; but if he can prove at the trial that they were given at the request and under the authority of the defendant, he, as holder for value, will be able to recover against the defendant.

1884.
May 23.
" 28.

Standard Bank
vs. D'Esterre.

Postea (May 28).—

JONES, J., said:—This is a case which came before the Court for argument on an exception taken by the defendant to plaintiff's declaration. The plaintiff in the declaration alleged that, between the 5th of January, 1883, and 12th of March, 1883, and before these dates, the defendant was one of the Managing Committee of the Kimberley Club, and that a certain number of promissory notes were given "on behalf of, and under the authority of, the said Committee in consideration of goods sold and delivered to the said Committee for the purpose of carrying out the objects of the said club;" that the parties who signed the notes signed them at the request of the defendant and under his authority; and that the trustees of the said club, on behalf as aforesaid, made and signed the promissory notes, and "thereby they in the said behalf promised to pay the said notes to the payees on maturity." There are further allegations of presentment and dishonour of the notes given. On referring to the annexed copies of promissory notes, we find that two gentlemen, Messrs. Craven and Ball, in their capacity as the trustees of the Kimberley Club, promise to pay certain individuals certain sums of money, on given dates, at the Bank of Africa, and that the payees of these notes have endorsed them over, and hence, probably, their eventual destination in the hands of the plaintiff Bank. Now in the declaration no cession of any right which these original payees, the persons alleged to have supplied goods to the Committee of the club, may have had, is set out; therefore, if any verbal promises were made by the Committee of the Kimberley Club, or a member of such Committee, to any of these original payees, the advantages (if any) which would accrue from such verbal promises still remain vested in the original payees, at least as far as the declaration is concerned. The promise which the defendant or any other member of the Committee may have made must have been made to somebody—the declaration is exceedingly vague upon this point—and the only persons to whom this original promise was made (as far as the Court can see from this declaration) must have been either the person from whom goods were

obtained or the trustees of the club, who, by this agreement, one must suppose, were in some way or another to be held harmless in case of action brought against them. Now, whether the persons to whom this promise was made were the payees or the trustees, in neither case has the benefit of such promise been transferred to the holders of the negotiable instruments annexed to the declaration. The Bank merely took by endorsement and delivery all the rights which appeared upon these notes; and it is admitted by the counsel for the plaintiff that his only claim, as far as the plaintiff is concerned, is by virtue of the endorsement and delivery by the original payees. What privity of contract then exists between plaintiff and defendant by virtue of any promise made by the defendant to some party not the plaintiff? There may have been some promise of guarantee or suretyship, not set out in the declaration; but if he made no promise to the plaintiff, and if the person to whom the promise was made has not ceded the benefit of, and right of action on, the promise, it is difficult to conceive in what manner the plaintiff has acquired a right of action against this individual defendant. On the faces of the notes no such guarantee or promise to pay appears. A strong argument might be raised against the plaintiff's claim in England (*vide Story on Promissory Notes*, sect. 457, etc.), if he based his action on a contract of guarantee under the Statute of Frauds; but with this question I need not deal, as first we have not a statute of the kind here, and the declaration does not allege a guarantee, but simply states that the promise made by the trustees of the club was made at the request of the defendant, by the defendant's authority and on his behalf. The meaning I attribute to the words of the declaration is simply this: the Managing Committee got goods, for the purposes of this club, from the payees of the notes, the notes were then signed by the trustees of the club at the request of the defendant, by his authority as a member of the Committee of Management, and on his behalf as such member. The plaintiff does not say that the defendant was acting *ultra vires* when he obtained these goods, or that he had no power to authorise the signing of these notes on behalf of the persons for whose benefit

1884.
May 23.
" 28.

Standard Bank
vs. D Esterre.

1884.
May 23.
" 28.
—
Standard Bank
vs. D'Esterre.

the goods were obtained. Even the consideration for the notes is not alleged to have been given to the defendant as a private individual, but to the Committee of the club as a body. On the documents themselves there appears no promise by the defendant to pay these notes, and we merely have two persons promising as trustees to pay. As to the liability of the persons who signed the notes, *Story* says in sect. 63 of the work already referred to:—

63. *Trustees, guardians, executors, and administrators.*—As to trustees, guardians, executors and administrators, and other persons acting *en autre droit*, they are, by our law, generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom or for whose benefit, or for whose estate, they act; and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility, by using clear and explicit words to shew that intention; but, in the absence of such words, the law will hold them bound. Thus, if an executor or administrator should make or endorse a note in his own name, adding thereto the words “as executor” or “as administrator,” he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate. In *Shoe and Leather Bank vs. Dix*, 123 Mass. 148, an instrument in the usual form of a promissory note, but beginning, “We, *as trustees but not individually*, promise to pay,” &c., was held not to bind personally the individuals that signed it; and it was held that no action could be maintained against them without proof that they had funds of the trust in their hands. As the instrument, by this construction, did not state any person absolutely liable to pay it, and the persons signing it were not bound to pay except, perhaps, out of a particular fund, the instrument would seem not to be a promissory note.

The trustees, however, are not sued in the present action. The conclusion at which the Court has arrived is that, upon the face of the declaration, no good ground of action against the defendant is shewn, and therefore that the exception must be allowed, with costs.

LAURENCE, J., concurred.

[Plaintiff's Attorneys, GRAHAM & GILBERT.
Defendant's Attorneys, STOW & CALDECOTT.]

PARKIN vs. RICHARDS AND KENNEDY, N.O.

Ordinance 104, §§ 21, 22.—Executor dative.—Review of Master's appointment.

Where the Master in the absence of competition had appointed a person, who did not fall within the classes of persons mentioned in sect. 22 of Ordinance 104, as executor dative of an intestate estate, and a creditor, who stated that he held powers from the other creditors and had been prevented by a bonâ fide mistake from attending the meeting, subsequently applied to have the appointment set aside and himself substituted as executor, and the Master supported the original appointment: the Court declined to interfere with the discretion of the Master and refused the application.

This was an application calling upon the respondents to shew cause why the appointment of Richards by Kennedy, the acting Master of the High Court, as executor dative of the intestate estate of Nixon, should not be set aside, and why the applicant should not be appointed in his stead. It appeared from the affidavits that the acting Master duly issued an edict calling on the next of kin and creditors of the deceased Nixon to appear on July 2, 1884, to see letters of administration granted by him to such persons as he should think fit. The affidavit of the applicant set forth that he repaired on July 1 to the office of the acting Master and informed him that he was a creditor of the deceased, and held powers of attorney from all the remaining creditors, and that he and the other creditors were desirous that he (the applicant) should be appointed executor dative of the estate; that the acting Master thereupon intimated that the meeting would be held on July 2, at 10 o'clock; that applicant attended at the appointed time, for the purpose of competing for the appointment, at the High Court instead of at the office of the Master, being under the impression that the meeting would be held in the High Court; that after waiting some time he went to the office of the Master

1884.
July 5.
Parkin vs.
Richards and
Kennedy, N.O.

1884.
July 5.
—
Parkin vs.
Richards and
Kennedy, N.O.

and found that the respondent Richards had been appointed to the office; that Richards was neither a creditor nor a relative of the deceased; that the assets of the estate consisted of money and diamonds in the District of Barkly, where the applicant resided, and that Richards had been requested to resign the office but had refused to do so. To the replying affidavit of the acting Master was annexed the notice calling the meeting at 10 A.M. at his office; and he therein further stated that as neither creditors nor next of kin appeared at the appointed place and time he had offered the appointment to Richards, who was in his opinion a fit and proper person to be entrusted with the office, and that Richards had accepted the appointment. He denied that the applicant had informed him, when he called on July 1, that he and the other creditors desired his appointment. He added that the money was deposited in the Bank, that he held the Bank's receipt therefor, and that in his opinion the diamonds should be realised by some competent person in Kimberley. An affidavit of Richards corroborated the Master as to the circumstances leading to his appointment, and admitted that he had been requested to resign it, but stated that he had declined to do so on the ground that he had already accepted the trust.

Lange, for the applicant, cited Ord. 104, sects. 21 and 22; *Deare and Deitz vs. Honeyborne*, Buch. 1868, 107; *Broers and Others vs. Schoonbie's Trustees*, Buch. 1870, 77. He contended that as the applicant had been prevented by a *bonâ fide* and natural mistake from being present at the meeting he should be placed in the same position as he would undoubtedly have occupied had he attended. The Master would have had no option in the matter, but would have been obliged to appoint applicant if he had attended, and therefore the principles of the cases cited applied to the present case, and the applicant should have the relief prayed for.

Hoskyns, C. P., for the respondents, was not called upon.

THE COURT refused the application, on the ground that the Master had exercised his discretion in a matter which by

the Ordinance was left to his discretion, and on the further ground that, in spite of the allegations contained in the applicant's affidavits, there appeared to be no good cause for interfering in the matter. The Court distinguished the cases cited by the applicant's counsel as applying only to the election of trustees in insolvent estates, in which case no discretion was left to the officer before whom the election was held, so that, in the cases cited, had it not been for a *bonâ fide* error, there would have been no possible doubt as to the person to be appointed. Here, however, in spite of what had since transpired, the acting Master on affidavit supported the appointment made by him. The application was therefore refused with costs.

1884.
July 5.
—
Parkin vs.
Richards and
Kennedy, N.O.

[Applicant's Attorney, RHODES.
Respondents' Attorneys, GRAHAM & GILBERT.]

BLAKE vs. GREENBERG.

Pleading.—Practice.—Rules of Court 21, 26, 27.

When a plaintiff has been duly barred from replying to the defendant's pleas, he is not entitled to make application that certain of the pleas should be struck out.

This was an application by the plaintiff in a certain suit wherein he claimed the value of certain goods wrongfully seized and sold by the defendant, and damages for their wrongful conversion. The defendant had pleaded several pleas, and, the plaintiff not having replied within the proper time, the defendant, after due notice, had barred him from so doing.

1884.
July 7.
—
Blake vs.
Greenberg.

Hopley moved in terms of a notice of motion, calling upon the respondent to shew cause why certain paragraphs of his pleas should not be struck out for irrelevancy and inconsistency.

Lord, Q.C., for the defendant, took the preliminary objection that, by the provisions of the 26th Rule of Court,

1884.
July 7.
Blake vs.
Greenberg.

the pleadings were closed, and it was not competent to make the present application.

Hopley produced an affidavit explaining that the delay on the plaintiff's side had been unavoidable, and contended that, even though he was barred from replying, he could nevertheless move to have certain portions of the pleas struck out.

BUCHANAN, J.P.:—This is a simple matter. Had this been an application to raise the bar, the affidavit produced by the applicant would no doubt have had some weight, and might have caused the Court to grant him relief; but the application is for an amendment of pleas which, in terms of the 26th Rule of Court, are closed. As the bar is still subsisting, the applicant can have no possible right to be heard in this form.

JONES, J., in concurring, quoted the terms of Rules 21, 26, 27.

Application refused, with costs.

[Applicant's Attorneys, GRAHAM & GILBERT.]
[Respondent's Attorney, BEEVOR.]

LONDON AND SOUTH AFRICAN EXPLORATION COMPANY,
LIMITED, vs. FRENCH AND D'ESTERRE DIAMOND MINING
COMPANY, LIMITED, AND REGISTRAR OF CLAIMS,
BULTFONTEIN MINE.

Act 19, 1883, §§ 65, 66, 78.—Abandonment of claims.—Mandamus.—Register of Claims.—Owners and lessees of claim ground.

Where the owners of claim property applied for an order on the Registrar of Claims to restore to the Register certain claims which had been abandoned by the lessees during the currency of their lease, the Court refused to make such order on motion.

This was an application calling on the respondents to shew cause why certain claims situated in the Bultfontein Mine, and leased by the applicant Company to the respondent Company by lease dated the 20th of November, 1883, to expire the 31st of August, 1885, should not be restored to the Register of Claims of the said mine. The facts were briefly as follows. On the 20th of November, 1883, the respondent Company had leased from the applicant Company, who were the owners of the soil, a certain block of claims in the Bultfontein Mine. Shortly thereafter they abandoned certain of these claims in terms of the provisions of sect. 65 of Act 19 of 1883; and on the 14th of December, 1883, the Inspector of the said mine, who had been duly appointed by Government as the proper officer for that purpose, gave notice, in terms of sect. 78 of Act 19 of 1883, to the applicant Company that the said claims had been abandoned, and called upon them to take upon themselves all the liabilities and responsibilities of an ordinary claim-holder in respect of the said claims. On the 5th of April, 1884, the applicant Company wrote to the Bultfontein Mining Board, inquiring whether they considered the claims in question to be vested in them by virtue of sect. 78 of the said Act, and if so whether they were prepared to pay the rent due on them. Receiving no reply, the Company again wrote to the said Board, and received in reply to their communications a letter stating that, as the applicant Company had failed to comply with the notice of the inspector, the provisions of the law must be taken to be in force. On the 5th of May, 1884, the applicant Company wrote to the Board informing them that, as the claims in question were held by the respondent Company under an unexpired lease, the said Company had no legal right to abandon them, and they therefore called upon the said Board to withdraw their pretensions to any right or title to the said claims, and to consent to their being placed once more upon the Register of Claims of the mine. After some further correspondence, the Board wrote on the 12th of May, 1884, disclaiming, in the circumstances, any right to the said claims. On the 5th of May, 1884, the applicant Company had written to the Registrar of Claims in the said mine, setting forth the lease and submitting that

1884.
July 5.
„ 15.

L. & S. A.
Exploration
Co., Ltd., vs.
French and
D'Esterre D. M.
Co., Ltd., and
Registrar of
Claims,
Bultfontein
Mine.

1884.
July 5.
„ 15.

L. & S. A.
Exploration
Co., Ltd., vs.
French and
D'Esterre D. M.
Co., Ltd., and
Registrar of
Claims,
Bultfontein
Mine.

the respondent Company had no right to abandon the said claims; they therefore requested him to restore the claims to the register. The Registrar replied on the 10th of May that he was unable to comply with their request without an order of Court or instructions from the Government. Correspondence had also taken place between the applicant Company and the respondent Company with reference to the right of the latter to abandon claims leased by them for a term. The affidavit in support of the application set forth that the claim-holders in the said mine are subject to rules and regulations, and duties and obligations, in respect to the working of claims, and that by abandoning their claims they evade such responsibilities, and cease to be amenable to the said rules and regulations; it was also alleged that by such abandonment the interests of the applicant Company were placed in jeopardy, first in regard to any claim that the Mining Board might set up to the claims in terms of Act 19 of 1883, and secondly with regard to the obligations cast upon the applicant by the bye-laws of the mine with regard to the working by owners of dangerous and fallen ground.

Hoskyns, C. P. (with him *Forster*), for the applicants, cited Act 19, 1883, sect. 78. By the terms of the lease, which was unexpired, the applicant Company could not sue for a breach of the lease, but only for the rent. They had no power of re-entry in case of a breach; the only condition was that the lessees were responsible for the rent for the whole of the term agreed upon. Here, however, the lessees claimed to be entitled to abandon the claims under sect. 65 of the Act. In such case, bearing in mind the provisions of sect. 78, the applicant Company would be greatly and irremediably damnified.

[*Lord, Q.C.*, for the respondent Company, admitted, in answer to the Court, that they were liable for the rent for the whole of the term, and that they continued to pay the rent.]

Forster followed on the same side, and contended that the applicants had clearly shewn imminent danger. They had a clear right, since the defendant Company admitted that they had to pay the rent for the whole term, and that they could

not cease to occupy constructively. An injunction would issue for specific performance of a contract, and this was a stronger case, for the tenant was absolutely destroying and making away with his landlord's property.

Lord, Q.C., contra :—Notice of abandonment of the claims had been duly given, and thirty days had been allowed to elapse without any steps being taken by the applicant Company; therefore the claims became by law the property of the Mining Board. If the respondent Company had broken their contract the applicant Company should try to obtain a remedy in an action for damages, but not by such an application as the present. The respondent Company, however, were allowed to go on working the rest of their claims; they paid the rent, which was all they were bound to do, and there was nothing to shew that there had been any breach of contract.

Hoskyns, C. P., in reply, observed that the Registrar of Claims was not opposing this application, and the only party opposing was the lessee himself. The lessee might be compelled to carry out the terms of his lease by an order for specific performance. He might be restrained from assigning his lease, and the acts in the present case were much more injurious to the landlord than an assignment would have been. The landlord here had no power to stop his tenant from abandoning the claims. He submitted that the Court should order the claims to be replaced on the register, and the proper position of the parties might be afterwards ascertained; if the Court did not interfere in behalf of the applicants they would lose their ground for ever.

Cur. adv. vult.

Postea (July 15),—

BUCHANAN, J. P., after reciting the facts as detailed in the affidavits and annexed correspondence, found that the matter was one which necessitated proof by an action, and that therefore the present remedy applied for by way of motion was incompetent, and that the application must be refused with costs. Applicants had not shewn a clear right nor,

1884.
July 5.
" 15.

L. & S. A.
Exploration
Co., Ltd., vs.
French and
D'Esterre D. M.
Co., Ltd., and
Registrar of
Claims,
Bultfontein
Mine.

1884.
July 5.
" 15.

L. & S. A.
Exploration
Co., Ltd., vs.
French and
D'Esterre D. M.
Co., Ltd., and
Registrar of
Claims,
Bultfontein
Mine.

failing that, irreparable damage and remedilessness in the premises. This was, in fact, a contest between the applicants and respondents for certain valuable property, which contest could not possibly be decided on motion; there were certain points connected with the alleged abandonment of the specific claims which were not, as matters of fact, clear, and required further proof, which could best be given by action.

JONES, J., said :—In this matter the applicants move the Court on a notice of motion, calling upon the respondents to shew cause why certain claims in the Bultfontein Mine, leased by the applicants to the French and D'Esterre Mining Company, under lease bearing date November 20, 1883, for the period of two years, shall not be restored to the Register of Claims of the said mine. The affidavit of the Manager of the applicant Company is admitted by the respondents to shew fairly the matter at issue. From this it will appear that the Inspector of Mines gave notice in writing, under sect. 78 of Act 19 of 1883, on the 14th December last, to the owner of the land upon which these claims are situated, that the claims already mentioned were abandoned by the French and D'Esterre Diamond Mining Company. Now this section provides that "*every abandoned claim in any mine situate upon land the title to which is not subject to any reservation of minerals and precious stones in favour of the Crown shall become the property of the mining board, body or officer mentioned in the 66th section of this Act, under and by virtue of the provisions of the said section, unless the owner of such land shall, within thirty days after he shall have received written notice from any officer duly appointed in that behalf of the fact that such claim has been abandoned, signify his willingness to take upon himself all the liabilities and responsibilities of an ordinary claimholder in respect of such claim.*" The French and D'Esterre Company had abandoned, we are told, under the provisions of sect. 65 of the Act, which provides that a claim shall be considered abandoned when "*the registered or rightful owner of the same shall give notice in writing to the inspector of his intention to abandon the same.*" In April last, the attorneys of the applicant company communicated with the Bultfontein Mining Board, and were informed by

the Secretary that the Board had been notified by the Inspector of Mines that, the applicant Company having failed to comply with the notice served by the Inspector, the provisions of the law must be taken to be in force—in other words that the claims had lapsed to the Mining Board. The applicants then called their attention to the fact that there was an existing lease, and asserted that the lessee had no right to abandon, and asked the Board to consent to relinquish any legal right, title, or claim, they might have to such claims, and consent to their restoration to the Register. Two further letters passed between the applicants' attorneys and the Mining Board, and eventually, on May 12, the Secretary of the Board wrote that under the circumstances the Bultfontein Mining Board disclaimed any right to the claims mentioned. The applicants' attorneys meantime, on May 5, had informed the Registrar of Claims that these claims were held under lease by the French and D'Esterre Company, that the term would not expire until August 31, 1885, and submitted therefore that they had no right to abandon, and requested the Registrar to restore them to the Register. To this letter a reply was sent to the effect that the Registrar was unable to accede to the request without an instruction to that effect from Government or an order of Court. Of these facts the respondent Company were duly informed. It is further alleged that the object of this abandonment is to evade the rules and regulations of the mine, and the consequent responsibilities and duties arising under them, and that the interests of the applicant company are placed in jeopardy, because of the claims which the Mining Board might set up, and because of a bye-law relating to dangerous ground. It must be noted that there is no allegation that the claims abandoned are at present, or were at the date of the abandonment, in a dangerous state, and therefore the Court has not now to deal with the matter as if imminent danger existed from a cause of this character. I wish carefully to guard myself upon this point, and I do not deem it necessary now to express an opinion as to the course which should be followed in such a case. We have merely to consider whether, on the facts alleged, the Court can and ought to grant a remedy in the nature of a *mandamus* to the

1884.
July 5.
" 15.

L. & S. A.
Exploration
Co., Ltd., vs.
French and
D'Esterre D. M.
Co., Ltd., and
Registrar of
Claims,
Bultfontein
Mine.

1884.
July 5.
„ 15.

L. & S. A.
Exploration
Co., Ltd., vs.
French and
D'Esterre D. M.
Co., Ltd., and
Registrar of
Claims,
Bultfontein
Mine.

Registrar to restore these claims to the Register, and an interdict or injunction restraining the respondent company from abandoning them after they have been so restored. Upon looking at the lease between the applicant and respondent Companies, I find no easement or agreement between the parties that the lessees shall remain registered as claimholders in the Register of Claims, or that the lessees shall take out the usual certificate of registration. Supposing then, that they did not continue to remain on the Register, but abandoned their claims as miners, what consequences would ensue? I take it that they could not escape from their duties and responsibilities under the lease, but would be compellable either to perform their covenants or be mulcted in damages for non-performance. But meanwhile, if by abandonment the lessors were compelled under sect. 78 to accept the liabilities and responsibilities of an ordinary claimholder in order to avoid forfeiture, the lessees could not complain if the corresponding advantages were also reaped by the lessors. It would be almost absurd to suppose that if the Bultfontein Mine were abandoned altogether, the lessees could be compelled to continue to work down as if the ground were producing diamonds; and moreover no stipulation is made that the lessees shall continue to work as miners, should they desire to cease working. Should they, however, abandon their claims, and damage ensue to the lessors, I have no doubt the Court could apply a remedy, though I need not now suggest the form it should take. According to Mr. *Lord's* statement, the lessees desire to continue paying rent and to perform the stipulations in their lease. It is obvious that the lease from the applicant Company alone does not confer the right to mine, though it may ensure a better tenure of the claims in the mine. I do not at present see upon what basis of clear right the Court can grant the remedy prayed. No doubt if the Exploration Company sustains damage it will have a legal remedy. We have not the Mining Board before us; but if the claims by operation of law have vested in them, this Court could not, on the mere motion of a party interested, divest the Mining Board of its rights, and vest them in other parties, even though we had it sworn on affidavit by the parties before the Court

that there had been a consent on their part to waive their rights, if any. The question we now have to determine amounts to this:—Does the lease and agreement before the Court enable the applicant Company to apply by motion for the restoration of the lessees' names as claimholders in the Register? I am clearly of opinion that by our law this remedy cannot be given. The case is almost analogous to that of a farm let for grazing purposes. The Court could not order a lessee to keep cattle on the farm let to him, though a remedy perhaps might be given in the form of damages, or, in case of user otherwise than in accordance with the terms of the lease, by interdict. The remedy of the lessor when the lessee quits before the end of his term is clearly pointed out by *Voet*, xix. 2, 22. Speaking of the "*actio locati*," he says:—"This action is brought to compel the lessee to pay the rent for the whole time expressed in the lease together with interest, even though the lessee has not made use of the property let, or has quitted before the end of the term without having some good cause for doing so." After discussing the question further he says, "nor is at variance with these principles that a landlord can instantly bring an action against the tenant . . . quitting before the end of his term, and thus can claim at once the rent for the whole of the remainder of the term," and further on he adds, "He may bring his action, not for the rent, which is not yet due, but to compel the lessee to give security for payment of the rent as it falls due, or for indemnifying him against loss. For by reason of the departure of the lessee the proprietor of the farm or house has no longer any security for his rent in the furniture of the tenant, which has already been removed, or in the produce of the land, which for want of cultivation cannot produce a good crop; and therefore in this case, as in all *bonæ fidei* transactions, when the time for payment has not yet arrived, an *action* may be brought to compel the giving of security, and if good cause be shewn, the Court will grant an order to that effect." I quite concur in the expression of opinion which during the course of the argument fell from the *Crown Prosecutor*, when he asserted that sect. 78 contained a most dangerous provision, and we need not look very deeply into the matter to see that there

1884.
July 5.
„ 15.

L. & S. A.
Exploration
Co., Ltd., vs.
French and
D'Esterre D. M.
Co., Ltd., and
Registrar of
Claims,
Bultfontein
Mine.

1884.
July 5.
„ 15.

L. & S. A.
Exploration
Co., Ltd. *vs.*
French and
D'Esterre D. M.
Co., Ltd., and
Registrar of
Claims,
Bultfontein
Mine.

are many cases in which it might operate most harshly against the owner of the soil. The case of a registered claimholder not being also the lessee of the soil, and *vice versa*, are *casus omissi*, and do not seem to have been contemplated by the legislature. We have, however, to deal with the law as it stands, and under it I am of opinion that the applicant Company cannot have the remedy for which they now pray. The application must be dismissed with costs.

[Applicants' Attorneys, STOW & CALDECOTT.
Respondents' Attorneys, H. C. & J. C. HAARHOFF.]

GOLDSCHMIDT & Co. *vs.* WALLIS.

Provisional sentence.—Promissory note.—Liability of Chairman of Mining Board.

Where the Chairman of a Mining Board was sued personally on promissory notes made by him “in his capacity of Chairman,” and signed with the words “Chairman to the Board” beneath the signature, the Court refused to grant provisional sentence.

1884.
July 15.

Goldschmidt &
Co. *vs.* Wallis.

Provisional sentence was claimed on two promissory notes, both of which were in the following form:—

“Mining Board Office, Dutoitspan,

“Dec. 15, 1880.

“£1105 2s. 9d.

“Three months after date I promise to pay (in my capacity of Chairman to the Dutoitspan Mining Board) to the order of Messrs. Solomon & Cohen, at the Standard Bank, Kimberley, the sum of £1105 2s. 9d. for value received.

“H. B. WALLIS,

“Chairman to the Mining Board, Dutoitspan.”

The notes were endorsed by the payees and had been dishonoured.

An affidavit had been filed by the defendant, which set

forth that in December, 1880, he was Chairman of the Mining Board, Dutoitspan, and that on the 13th of that month, at a meeting of the Board, it was reported that two notes made by the Board in favour of Solomon and Cohen for £1105 2s. 9d. each would fall due on the 15th inst., whereupon it was resolved that the Chairman should sign renewals of the notes in full; that the notes now sued upon were the renewals signed in consequence of such resolution; that with regard to the second of the two notes—on which the signature “H. B. Wallis” appeared below as well as above the words “Chairman to the Mining Board, Dutoitspan”—the lower signature had been placed in that position by mistake, and upon the mistake being pointed out the upper signature had been made in its proper place, but the lower one left unerased by inadvertence. The affidavit further set forth that defendant did not sign the notes either as surety or principal debtor, that he had never previously received any demand upon them, that the notes of which these were renewals were not signed by the defendant but by his predecessor in the office of Chairman to the Board, and that the plaintiffs were well aware of all the circumstances set forth in the affidavit at the time when the notes were endorsed over to them.

1884.
July 15.
—
Goldschmidt &
Co. vs. Wallis.

Hoskyns, C. P. (with him *Lange*), for the defendant, cited *Norton vs. Satchwell* and *De Kock vs. Russouw and Another*, 1 Menz. 77, 78, to shew that the fact of a person's signature appearing upon an acknowledgment of debt as a surety did not necessarily make him liable in a provisional case. This was a question for a jury to decide upon. In *Leadbitter vs. Farrow*, 5 M. & S. 345, it had been laid down that an agent drawing a bill for his principal would be personally liable “unless he states on the face of the bill that he does so by procuration.” He referred to *Byles on Bills*, 12th ed. p. 36; *Chitty on Bills*, p. 34; *Story on Promissory Notes*, sects. 64, 65, 69; *Bult vs. Morrell*, 12 A. & E. 745, and argued that the wording of the document now sued upon, together with the facts as set forth on affidavit, shewed clearly that the defendant signed merely as Chairman and did not make himself personally liable.

1884.
July 15.
Goldschmidt &
Co. vs. Wallis.

Lange followed on the same side and referred to *Alexander vs. Sizer*, L. R. 4 Ex. 102, and *Lindus vs. Melrose*, 27 L. J. Ex. 326.

Lord, Q.C. (with him *Forster*), for the plaintiffs, referred to *Byles on Bills*, 12th ed. 75; *Nicholas vs. Diamond*, 9 Exch. 154; *Bottomley vs. Fisher*, 1 H. & C. 211; *Price vs. Taylor*, 5 H. & N. 540; *Mare vs. Charles*, 5 E. & B. 978; *Gray vs. Raper*, L. R. 1 C. P. 694; *Lindus vs. Melrose*, 27 L. J. Ex. 326; *Dutton vs. Marsh*, 40 L. J. Q. B. 175. If the defendant was not personally liable on these notes no one would be liable, since in the case of *Goldschmidt & Co. vs. Dutoitspan Mining Board* [see H. C. Repp. vol. ii. p. 195] it had been decided by LAURENCE, J., that the present Mining Board of Dutoitspan was not liable, because their predecessors when they incurred the liability had had no legal existence as a Board. [*Hopley*, as *amicus curiæ*, mentioned that the legality of the existence of the Board had not been decided in that case; but the Court had refused provisional sentence as the matter was very doubtful.] He also referred to *Westhuysen vs. Pope and Devenish*, 2 Menz. 64; *Kelner vs. Baxter*, L. R. 2 C. P. 174; *Story on Agency*, sects. 155, 157.

Forster followed on the same side, and argued that the question was whether on the face of the documents there was anything to shew that the defendant was not liable. The words in the body "in my capacity as Chairman of the Board" were descriptive merely and inoperative to affect the signature, the general rule being that no words of a merely descriptive character altered the liability on the note. The words "in my capacity as Chairman of the Board" did not repudiate liability, though they might protect the maker against the Board itself. The note did not purport to be "on behalf of" the Mining Board, to which the words "in my capacity as Chairman of the Board" were not equivalent. In *Hudson vs. Cozens*, 1 Menz. 126, the words "assistant cashier of the C. G. H. Bank" were held to be merely descriptive. Such terms as "Manager," "Secretary," "Chairman," &c., were merely descriptive. The defendant, to free himself from personal liability, should have written "In my capacity as Chair-

man of the Board *and not personally*," or words to that effect.

1884.
July 15.

Goldschmidt &
Co. vs. Wallis.

BUCHANAN, J.P.:—The Court is now dealing with a provisional case, and not with the principal case, and the short question we have to determine is what is the liability of the defendant? We have three main points to guide us. First, the notes were made, or purport to be made, at the office of the Mining Board, Dutoitspan. Secondly, the promise is to pay "in my capacity as Chairman of the Board," these words being pointedly put into the body of the note; and thirdly, the signature is by the defendant as "Chairman of the Mining Board, Dutoitspan." It appears to me clear that Wallis, when he signed these notes, was only binding the Board of which he was Chairman. He was really (to use the words of Lord Ellenborough in *Lead-bitter vs. Farrow*) "a mere scribe." The English cases seem to favour both sides of the question, and there seems to have been only one Colonial case in point, *viz.*, *Hudson vs. Cozens*, which however cannot be held to have decided what liability would attach to a maker of a note who added such a description of his capacity as in the present case. It appears that the present plaintiffs have endeavoured in the previous case of *Goldschmidt & Co. vs. Yonge, N. O.*, to obtain a provisional judgment on these very notes, and Mr. Justice LAURENCE has refused provisional sentence. It is possible that in the principal case the plaintiffs will be able to shew that the defendant undertook a personal liability, but I think we should refuse provisional sentence.

JONES, J.:—I concur on the simple ground that the notes are signed by the defendant as Chairman of the Board, and the same capacity is set forth in the body of the notes. I think he signed only in that capacity and that the words used were meant to limit his liability to his capacity. A number of cases have been quoted where, descriptive words only having been used, the makers of notes or drawers of bills have been held personally liable. In *Hudson vs. Cozens*, the Supreme Court drew a distinction between descriptive words and words used to shew that a person was

1884.
July 15.
—
Goldschmidt &
Co. vs. Wallis.

acting in a certain capacity. In this case I should hold that the words "in my capacity as Chairman of the Board" were equivalent to "for and on behalf of the Board."

Provisional sentence was therefore refused, with costs.*

[Plaintiffs' Attorneys, CORYDON & CALDECOTT.
Defendant's Attorneys, H. C. & J. C. HAARHOFF.]

ROSE INNES DIAMOND MINING COMPANY, LIMITED, vs.
CENTRAL DIAMOND MINING COMPANY, LIMITED.

Amalgamation of Mining Companies.—Completion of contract.—Powers of Directors.—Ultra Vires.

Where two mining companies had agreed to amalgamate upon a certain basis, and had empowered their respective directors to arrange the details, and the directors had subsequently entered into certain arrangements which were ultra vires, but the amalgamation had been in the main carried out on the original basis, one of the terms of which was that the amalgamated Company should pay one of the Companies at a certain rate for its high ground, on the quantity being measured, and an approximate measurement had afterwards been made:—Held, that, notwithstanding the circumstance that the agreement between the directors as to certain points had been ultra vires, there had been a completed contract with regard to the high ground, and the Company which formerly owned the ground was entitled to recover from the amalgamated Company, which had taken it over, the value of the said ground at the rate originally fixed, and for the quantity ascertained by the subsequent measurement.

1884.
July 28.
" 29.
" 30.
Oct. 10.
—
Rose Innes
D. M. Co., Ltd.,
vs. Central D. M.
Co., Ltd.

In this action the plaintiff Company alleged that on the 1st of August, 1883, it was agreed between it and the defendant Company that certain properties belonging to the plaintiff Company, situated in the Kimberley Mine, should be acquired by the defendant Company, and that it formed

* Compare the case of *Anderson & Co. vs. Reynolds and Tiller*,
4 Buch. E. D. C. 215.

a portion of the said agreement that certain high ground consisting of diamondiferous soil, the property of the plaintiff Company, and standing in their claims in the said mine, above the level of 100 feet below the top of the hard rock, should become the property of the defendant Company for the price or sum of five shillings per load of 16 cubic feet, less certain deductions amounting to £5512 13s. 4d.; that the terms of the said agreement were contained in a letter annexed to the declaration; that it was understood and agreed between the plaintiff Company and the defendant Company that the high ground should be surveyed and measured for the purpose of ascertaining, as nearly as possible, the amount of high ground to be paid for by the defendant Company, and that a competent surveyor should survey or measure it. The declaration further alleged that, in accordance with the terms of the said agreement, the assets and liabilities of the plaintiff Company were taken over by the defendant Company, and the ownership and control of the said high ground were transferred to them; that the said high ground was measured and found to contain 117,940 loads, or thereabouts; the plaintiffs alleged that all things had happened, etc., to entitle them to demand payment for the high ground, and that the amount due to them, after allowing for the deduction of the £5512, was £23,972 16s. 8d. In the alternative, the plaintiff Company relied upon the facts above set forth, save as to the alleged measurement, and the declaration proceeded to state that all times had elapsed, etc., to entitle the plaintiff Company to demand completion of the agreement, yet the defendant Company had hitherto neglected to measure the said high ground by survey, or to pay the plaintiff Company 5s. per load upon such measurement. The plaintiff Company prayed for (1) £23,972 16s. 8d., with interest *a tempore moræ*, or (2) in the alternative, an order compelling the defendant Company to cause the high ground to be measured in terms of the said agreement, and to pay 5s. a load upon such measurement, less the £5512 13s. 4d. to be deducted as aforesaid, or otherwise for £25,000 as damages for breach of contract. The letter attached to the declaration was in the following terms :

1884.
July 28.
" 29.
" 30.
Oct. 10.

Rose Innes
D. M. Co., Ltd.,
vs. Central D. M.
Co., Ltd.

"The Central Company, June 28th, 1883.

1884.
July 28.
" 29.
" 30.
Oct. 10.

Rose Innes
D. M. Co., Ltd.,
vs. Central D. M.
Co., Ltd.

"To the Chairman and Directors of the ROSE INNES DIAMOND MINING COMPANY, LIMITED.

"Gentlemen,—Mr. English, one of the directors of this Company, has reported to the Board of Directors that he has ascertained from Messrs. Cowan and O'Leary that there is a desire on the part of your Company to amalgamate with the Central Company, and that the following terms have been arranged as a basis of negotiations—viz., Central scrip to be issued for $12\frac{1}{2}$ claims at the rate of £8000 a claim. That measurements at a depth of 100 feet below the level of the hard rock facing road six north shall be made, and that should the extent of claim ground at that depth be greater than $12\frac{1}{2}$ claims, then scrip shall be issued for such excess at the rate above mentioned. That the sum of 5s. per load of 16 cubic feet shall be paid to the Rose Innes Company for all ground above the aforesaid level at which measurement shall be made. Machinery and rolling stock to be given in. The amalgamated Company to settle all liabilities of the Rose Innes Company. All Mining Board paper held by the Rose Innes Company to be taken over by the amalgamated Company at par value as a set-off against the liabilities of the Rose Innes Company, discount to be allowed on all current paper. Any balance between liabilities and Mining Board paper to be deducted from payment to be made on account of high ground. This proposition has been favourably received by the Board of Directors, who will appoint a Committee to inspect the books of your Company, in order to verify the returns and statements of the yield from your ground, etc., and in the event of the report of this Committee proving satisfactory, they will be prepared to recommend to the shareholders the completion of the contemplated amalgamation. Some delay will, however, be unavoidable, as a large number of the Central shareholders reside in England, and will have to be consulted. "Yours, etc., "K. TUCKER, Secretary."

The defendant Company by their pleas admitted the statements in the declaration concerning the letter; also that the possession of the high ground had been, as alleged, transferred to the defendants; also that they were entitled to receive from the plaintiffs the sum of £5512 13s. 4d. They denied that the alleged agreement was ever a completed agreement, but pleaded that it was merely an offer of amalgamation of the properties of the plaintiff and defendant Companies on a certain basis of amalgamation as therein contained; that this basis of amalgamation was afterwards agreed to by the plaintiffs on the 25th of July, 1883, and that on the 1st of August the defendant Company duly authorised their directors to conclude the said negotiations, and settle the details of the proposed amalgamation with

the plaintiff Company; that the plaintiff Company, on or about the 12th of September, 1883, duly granted like powers to their directors; that the settlement of the said details formed a condition precedent to the completion of the said agreement; that, on the 8th of October, 1883, it was agreed between the directors of the two Companies that the said details of the said amalgamation should be settled and agreed upon in a certain way, and that the said agreement for amalgamation should thereupon be concluded and be binding upon and between the parties; that the agreement between the directors on behalf of their respective Companies was to the following effect: 1st, That the number of loads of blue for which the defendants were to pay 5s. a load should be fixed and determined at the number of 110,000 loads; 2nd, That in addition to the sums due by the plaintiffs to the defendants, the defendants should be allowed to deduct from the sum so to be paid by the defendants for the said blue ground the further sum of £11,240 8s. 7d., and that thereupon the plaintiff Company should be allowed to share *pro rata* with the defendant Company in certain cash, diamonds, Mining Board promissory notes, blue ground, lumps and stores, then the property of the defendant Company, and of the value of £92,007 2s. 4d.; 3rd, That the payment of the balance found to be due by the defendant to the plaintiff Company should be made by a promissory note made by the defendants and payable eighteen months after date, subject to the following conditions: (a) That, should the Kimberley Mining Board obtain a loan and pay to the defendants certain large sums of money then due and owing to them by the said Board, or a sufficient portion of such debt to cover the amount of the said note at any time before the maturity of the said note, the note should become at once due and payable to the plaintiffs; (b) That the defendants should retire the said promissory note before declaring any dividend; (c) That in case of payment before maturity full rebate of interest should be allowed. The plea proceeded to state that, the said details having been thus arranged between the said directors, the defendants thereupon delivered to the plaintiffs and the plaintiffs received and accepted scrip in the capital stock of the

1884.
July 28.
" 29.
" 30.
Oct. 10.

Rose Innes
D. M. Co., Ltd.
vs. Central D. M.
Co., Ltd.

1884.
 July 28.
 " 29.
 " 30.
 Oct. 10.

Rose Innes
 D. M. Co., Ltd.,
 vs. Central D. M.
 Co., Ltd.

defendant Company to the amount agreed upon in the said offer annexed to the declaration, and the plaintiffs duly transferred to the defendants their said claims in the Kimberley Mine, and the plaintiffs became entitled to and did participate in the benefits accruing from the said £92,007; that thereafter the balance due by defendants to plaintiffs by reason of the premises was ascertained to amount to £10,746 18s., and no more; that the defendants had always been ready and willing to give to the plaintiffs a promissory note in terms of the said agreement for the said amount of £10,746, and on the 18th of December, 1883, and before action brought, did offer and tender a promissory note in terms thereof, but the plaintiffs refused to accept it, and defendants again in the plea tendered their promissory note for the said sum in terms of the agreement aforesaid. The defendants further alleged that the said agreement for amalgamation between the parties was not a complete and binding agreement until the said details had been and were agreed upon, and that the said details were agreed upon on the terms and in the manner already set forth, and that the said scrip was delivered by the defendants to the plaintiffs, and the plaintiffs became entitled to share in the said £92,007 in consideration thereof, and for no other reason, as the defendants were ready to verify. In the alternative, the defendants relied on the previously stated allegations, and pleaded that the said details so referred for settlement and arrangement to the said directors of the said Companies still remained and were in dispute and unsettled, and that until the same should be finally settled and agreed upon the plaintiffs were not entitled to recover in this action. As a further defence, the defendants admitted that the said blue ground referred to in the pleadings was to be taken over, on the completion of the agreement for amalgamation, at the rate of 5s. per load by the defendants, but they denied that it was understood and agreed upon between the parties that it should be surveyed as alleged by the plaintiffs. They also denied that it had ever been surveyed as alleged, or that the number of loads as alleged was accurate. The defendants further said that they were, and had always been, ready and willing to work the said blue ground down, and

to account to the plaintiffs from time to time in respect of the same, as it should be worked down, at the rate of 5s. a load of 16 cubic feet. The replication was general.

This action may be described as a continuation of the suit between the same parties in which the defendants had been absolved from the instance [*vide supra*, p. 272] and the evidence in the previous case was upon the application of the defendants admitted as evidence in the present case, upon the understanding that the objections previously urged on behalf of the plaintiffs to the admissibility of portions of that evidence were now repeated.

The plaintiffs called J. J. O'Leary, one of the trustees of the plaintiff Company, who deposed that he had known the actual state of the Rose Innes claims before August 1883. He produced a model and explained the state of the ground to the Court. Surveyor Tucker had been agreed upon by both parties to survey the ground in September, and witness had given him *data* upon which to go in arriving at the number of loads of high ground, which was then and also at the time of the trial of the cause entirely covered with reef. At the time of the amalgamation arrangements it was never suggested that the quantity should be ascertained by actual haulage; that suggestion had been only lately made, and it would take years to complete delivery by that mode. On the 27th September, 1883, there was a meeting at the office of the plaintiff Company, at which Messrs. Tracey, Benningfield and Bottomley were present as representatives of the Central Company. The object of the meeting was to ascertain the extent of the high ground. Surveyor Tucker's report, fixing the amount, was produced. Witness explained to the Central Company's directors that he had given Tucker most of the *data* upon which he went in calculating, and they made no objection. They then said nothing about ascertaining the amount by haulage. The Surveyor, who was present, said that 110,000 loads was a fair estimate. In the Kimberley Mine 16 cubic feet "loose" were equal to between 9 and 10 feet "solid"; that was the scale fixed by the Mining Board; in the mine a "load" is 16 cubic feet loose. At this meeting the Central Company's directors offered 90,000 loads as a final computation, but the directors

1884.
July 28.
" 29.
" 30.
Oct. 10.

Rose Innes
D. M. Co., Ltd.,
vs. Central D. M.
Co., Ltd.

1884.
 July 28.
 „ 29.
 „ 30.
 Oct. 10.

Rose Innes
 D. M. Co., Ltd.,
 vs. Central D. M.
 Co., Ltd.

of the plaintiff Company refused to accept less than 110,000 loads, and no agreement as to the quantity was then arrived at. Since then, according to the Central Company's reports, they had hauled 4000 loads of this ground, but had paid the plaintiffs nothing. In cross-examination, the witness deposed as follows:—It was the amalgamated Company which would have to pay for the high ground. There was never an agreement that cash should be paid at once upon the measurement being made; that seemed to be tacitly understood. It never struck me that the mode of payment was a detail for arrangement. I consider that the letter of June 28 sets forth the mode of payment, *i.e.*, 5s. a load, payable on ascertaining the amount. A survey such as was made in this case is only approximate, within 10 or 12 per cent. either way. The meeting of September 27 was quite informal and nothing was agreed upon. The amount has never been agreed upon; it would have been settled at 110,000 loads if the meeting of October 8 had been formal. Re-examined:—There never has been any offer to pay, except after deduction of a share of assets to which the plaintiffs say they are entitled in full. Plaintiffs have no objection to taking negotiable bills in payment.

Mr. Tucker, the surveyor, deposed that he had surveyed the high ground and could say without doubt that there were over 100,000 loads. He had reported 110,000, as he thought that the most likely quantity. Witness admitted that he measured the depth of reef on the high ground at only one spot; it was almost impossible to find out the amount of reef accurately, and the survey could not be accurately made unless the surface were cleared of reef, but the survey made was as fair and accurate as the circumstances would permit.

The plaintiffs having closed their case,

Forster (with him *Hopley*), for the defendants, applied for absolution from the instance on the following grounds:—(1) That no completed contract between the plaintiffs and defendants had been proved; (2) That, even if a complete contract had been proved, no agreement to measure had been proved; (3) That no accurate and trustworthy measurement had been proved; (4) That no agreement to pay cash had been proved; (5) That no sale to the defendant Company as

alleged in the declaration had been proved. He contended that if the agreement of October 8 were good the plaintiff's case was at an end, if bad, as being *ultra vires*, then the original agreement was merely inchoate. Moreover there was nothing to shew that the amalgamated Company had agreed to take over and pay in cash for the thing sold.

1884.
July 28.
" 29.
" 30.
Oct. 10.
—
Rose Innes
D. M. Co., Ltd.,
vs. Central D. M.
Co., Ltd.

THE COURT pointed out a technical difficulty. By consent of parties the evidence in the previous case had been admitted as evidence in the present suit. The defendants were therefore now applying for absolution when a great deal of their evidence was already taken. As this course was irregular, absolution must be refused, and it was unnecessary at the present stage of the case to go into the other points which had been raised.*

The defendants called Mr. P. W. Tracey, one of the directors of the Central Company, who deposed that there was never any arrangement as to the quantity of the high ground, and the payment for it, save at the meeting of October 8. If that meeting was not binding, then the details which were left to the directors of the two Companies were still unsettled. The Rose Innes Company sold the high ground to the amalgamated Company; an accurate survey of that ground was impossible. The Central Company's directors had never accepted Tucker's survey as absolutely correct, nor had they bound the Company to the survey. On October 8 they agreed to accept 110,000 loads as correct, together with the other details which were then

* On this point compare the *nisi prius* case of *White vs. Walker and Others*, *contra* Huddleston, B., and a jury, reported in the *Times* of March 10, 1885. In that case it was agreed that it would be more convenient to read all the evidence, the defendants' as well as the plaintiffs', which had been taken in Japan on commission, at the commencement of the case, and that course was accordingly pursued. At the conclusion of the plaintiff's case, counsel for the defendants submitted that there was no evidence to go the jury, and the learned Judge was inclined to take that view. Counsel for the plaintiff then submitted that there could be no non-suit, inasmuch as part of the defendants' evidence—that taken on commission—had been read, and was therefore before the jury. Mr. Baron Huddleston, after some discussion, said that the point appeared a good one, and under all the circumstances the case had better be left to the jury.—*Ed.*

1884.
 July 28.
 „ 29.
 „ 30.
 Oct. 10.

Rose Innes
 D. M. Co., Ltd.,
 vs. Central D. M.
 Co., Ltd.

arranged. Cross-examined:—I remember urging on the measurement of the claims, to get it finished so as to close our books. We have never offered payment, save with the deductions for which we contend. Personally, I thought 103,000 loads would be the amount. In our report to our shareholders we put it down at 110,000 loads, basing our report on the evidence before us. As a matter of fact the old Central Company advanced the money to the Rose Innes Company to pay the surveyor. The assets of the Central Company were omitted in the letter of June 28. The letter was written after a thorough discussion by our directors; there was no special object in omitting to mention them; forgetfulness may have had something to do with it. They were not purposely omitted. Re-examined:—We thought that it went without saying that the assets would remain the property of the Central Company's shareholders. The books of the old Central Company are now closed. By the Court:—The distinction between the old Central Company and the amalgamated Central Company is that the capital has been increased and new shareholders have been added. All the shareholders of the present Company would have to pay for the high ground, out of the profits made in working the new Company. Mr. J. Benington, another director of the Central Company, gave similar evidence, and the defendants closed their case.

Hoskyns, C. P. (with him *Lange*), for the plaintiffs:—The plaintiffs' position is strengthened by the additional evidence. It is clear that the assets formed part of the amalgamation, because they were specially considered by the Central directors and yet not specially excluded. The amount of high ground is clearly proved to be 110,000 loads at least. The directors of both Companies have ever since the survey adopted that as the accurate amount, and the Central Company directors say so in their report. It is absurd to suppose that the parties meant to wait for two or three years until haulage had determined the actual amount. The evidence shews that Tucker was appointed by both parties. If the Court cannot find that Tucker's estimate of 117,000 loads is correct, then judgment might be given under the

Court's equitable jurisdiction for the price of 110,000 loads, and for the payment of the balance when it could be accurately ascertained. As to the equitable powers of the Court to carry out the intentions of the parties to a contract, he referred to *Story on Contracts*, sects. 640*b*, 643; *Eden vs. Lyons*, 3 Ves. 692. The parties could not have intended that the survey should be mathematically accurate, and the contract meant that as good a survey as was possible should be made, and this has been done. No agreement having been made to give credit, the proper construction of the contract is that payment should be made in cash as soon as the amount is ascertained. This was done on September 27; payment ought then to have been made, and the defendants ought to pay interest from that date.

Forster, contrà.—Equity is on the side of the defendants. The contract was not that the defendant Company should acquire the plaintiff Company's ground, but that the two Companies should be amalgamated, and that the ground should be acquired by the amalgamated Company. If there was a sale it was one from A to A+B. There was no language to shew that a cash payment was intended. The vendors sold to a Company in which they had an interest. The beneficial enjoyment of the chattel sold was of necessity postponed, and expenses were daily accruing on it in the way of rates, &c. Equity then would not require a cash payment, especially as in this instance the selling Company has an interest until the amount is paid. In the previous case the plaintiff Company had tried to get paid for 110,000 loads upon an agreement which was held to be *ultra vires*. They are now trying to get all the advantages of that agreement. If the meeting of October 8 was *ultra vires*, then all things are *in statu quo*, everything is inchoate, a basis had been agreed upon, but all the details were unsettled. The plaintiffs have brought their action on a contract which they allege to be complete; they have not confined themselves to an action for a declaration of rights. Referring to the judgments in the previous case, he pointed out that both the Judges had found that on September 24, 1883, nothing had been completed. Nothing had happened since then, save the abortive meeting of October 8. Mr.

1884.
July 28.
" 29.
" 30.
Oct. 10.
Rose Innes
D. M. Co., Ltd.,
vs. Central D. M.
Co., Ltd.

1884.
 July 28.
 " 29.
 " 30.
 Oct. 10.
 —
 Rose Innes
 D. M. Co., Ltd.,
 vs. Central D. M.
 Co., Ltd.

Justice LAURENCE had found that the mode of payment was one of the details to be settled; and O'Leary, the plaintiffs' witness, had admitted that the details were not yet settled. There is no agreement to survey the ground, nor had the Central Company ever agreed to be bound by Tucker's figures. It is said that it was not suggested until lately that the amount of ground should be ascertained by haulage; perhaps that is so, but on the other hand there was never any agreement to pay in cash before delivery of the ground. The delivery would not take place until the ground was hauled, even though the licences to the claims had been transferred. It is admitted that the ground cannot be accurately surveyed, and what has been done was upon Mr. O'Leary's data. The 110,000 loads was fixed at the 8th of October meeting which was *ultra vires*, and that amount appeared in the directors' reports to the shareholders of the defendant Company only because of the agreement of October 8. The plaintiffs therefore cannot rely on that. The defendant Company has always maintained, however, that there was a *consensus* at the meeting of October 8, and they are prepared to abide by the arrangements then made. This also explains why they worked the high ground; but if that meeting was *ultra vires*, then nothing has yet been settled and the plaintiffs cannot succeed.

Hoskyns, C. P., replied.

Cur. adv. vult.

Postea (Oct. 10), the following judgments were delivered:—

BUCHANAN, J.P., after reciting the pleadings, said:—This case has been so long before the Court, and so fully and repeatedly argued, and the facts so fully set forth in the reported judgments given on May 8, 1884, by my brothers JONES and LAURENCE, that it appears to me a reiteration to be with deliberation avoided to repeat those facts in detail. I accept the clear statements of facts given in those judgments as statements to which I could add nothing with advantage, and without a great waste of time. I was not present at the delivery of the judgment in question, which

was one of absolution from the instance, but concurred in it, as the matter then presented itself to me. On re-argument and reconsideration, however, I have come to the conclusion that there should be a judgment for the plaintiffs for the amount and value of the high ground taken delivery of by defendants, and on these simple grounds. The case as it now stands is differently situated to the first action. There is no such difficulty as was apparent in the former case of non-proof of the number of loads agreed on, which in itself was one reason for absolution granted. The surveyor who measured the ground has now been called, and we have his evidence before us supplying the former deficiency, and I believe that he surveyed in the only way practicable, it being impossible to do so at the stage we have reached in the working of these mines with absolute certainty, short of haulage of every load. Without going, as I have said, into many details, I will simply say that in my opinion when, on the 1st August, the Central Company at its meeting of shareholders agreed to the resolution of the Rose Innes shareholders of the 25th July, there was a completed contract between them in terms of the letter of June 28 as to this high ground. It is true that the directors of both Companies at subsequent meetings, and notably that of October 8, without being specially empowered to arrange details, as the Trust Deeds of both Companies require, or reporting these details to their shareholders for ratification, went beyond, and did certain acts which were *ultra vires*; but they being *ultra vires* must, as it seems to me, be simply stripped away, leaving the contract as it stood between the Companies on the 1st August. That contract fixed the price at 5s. a load for all ground above a certain level. The measurement has been made, and according to the surveyor there are 117,000 loads. Making allowance for any error there may have been in the measurement of the ground, if in round numbers we fixed 100,000 as the number of loads, that would give £25,000, less £5512 13s. 4d., or equal to £19,487 6s. 8d., or say in round numbers £20,000, for which amount I am of opinion judgment should be entered for the plaintiffs, with costs. Under the circumstances, I think this is the easiest and most equitable way out of the difficulty

1884.
July 28.
" 29.
" 30.
Oct. 10.

Rose Innes
D. M. Co., Ltd.,
vs. Central D. M.
Co., Ltd.

1884.
 July 28.
 „ 29.
 „ 30.
 Oct. 10.

Rose Innes
 D. M. Co., Ltd.,
 vs. Central D. M.
 Co., Ltd.

in which both Companies have landed themselves. The Companies, by the delivery and working of the ground, and transfer and re-transfer of scrip, are practically amalgamated. Even although there might be refined legal difficulties to be still found theoretically, the amalgamation cannot now be undone. It is to the joint interest of the parties that this long pending dispute should be settled, and I believe the present solution of it is the best that can be adopted to save further trouble and inconvenience. There is a certain class of cases in which the equitable powers of the Court must be called into the fullest play, and I think this is one of them. Judgment for plaintiffs for £20,000 and costs.

JONES, J.:—Since the former action between these parties was heard and decided in this Court, the real facts of the case between the litigants have not altered, but in this suit they have been presented to this Court under different pleadings and with fresh evidence. It would be an utter waste of valuable time to repeat the statement of facts made in the judgment delivered upon the 8th May last. For the purpose of the present judgment I need only state that I have not found any reason to alter in any material degree the views I then expressed. In the former action the plaintiffs relied upon an agreement as to the number of loads of blue ground for which they claimed. In this action they rely upon the survey of Mr. Tucker as shewing the amount for which they are to be paid. In the last action I held that we had merely to deal “with the claim set up in the plaintiff’s declaration, and with the pleas of the defendant;” that the plaintiff was then attempting “to enforce not the terms contained in the letter of the 28th June only,” but that he was trying “to take advantage of the agreement entered into between the directors of the two companies in so far as it was not *ultra vires*,” and that if the Rose Innes Company “alleged *ultra vires* at that meeting the whole of the contract entered into must be treated as null and void.” I further pointed out that, upon the evidence and pleadings then before the Court, “if the amount of blue ground were fixed at any time it must have been at the meeting on the 8th October, and then merely as

a compromise, other conditions being added as a *quid pro quo* for the concession as to the number of loads," that the plaintiff had declared upon a special contract in which he alleged that a *specific number of loads was agreed upon* between the two companies, and that this agreement was made upon the 1st August, "that no evidence was given as to the nature of Mr. Tucker's measurement of the blue ground," and that the only information before the Court as to this was to be gathered from the letter of the Central Company to the Rose Innes Company of the 24th September. The plaintiff Company now alleges a concluded agreement on the 1st August, 1883, containing the terms mentioned in the letter of 28th June, 1883; that under the terms of this agreement the defendant Company were entitled to deduct from the amount payable by them in respect of the high ground the sum of £5512 13s. 4d. being the excess of liabilities of the plaintiff Company over assets; and that under the agreement the assets and liabilities of the plaintiff Company and the possession, ownership and control over the high ground were transferred to the defendant Company. The plaintiff Company claims 117,940 loads as being the extent of high ground according to measurement, and the sum of £23,972 16s. 8d. as the amount due for high ground after the deduction of the sum of £5512 13s. 4d. already mentioned. The plaintiff Company also inserts an alternative count alleging neglect to measure the ground on the part of the defendant Company, and a prayer for an order directing that the ground be measured and that the defendant be ordered to pay the plaintiff Company at the rate of 5s. for every load of 16 cubic feet. The defendants virtually set up the same pleas as before, alleging that the letter of the 28th June was a mere offer of amalgamation on a certain basis, and that the defendant Company authorised their directors "to conclude the negotiations and settle the details of amalgamation with the plaintiff Company;" that similar powers were conferred upon the directors of the plaintiff Company; that eventually the agreement of the 8th October was concluded; and that amalgamation upon the terms then agreed upon took place. In an alternative plea they allege that as the details of the amalgamation

1884.
July 28.
" 29.
" 30.
Oct. 10.

Rose Innes
D. M. Co., Ltd.,
vs. Central D. M.
Co., Ltd.

1884.
 July 28.
 " 29.
 " 30.
 Oct. 10.

Rose Innes
 D. M. Co., Ltd.,
 vs. Central D. M.
 Co., Ltd.

have not yet been agreed upon the plaintiffs cannot now recover in this action. The defendants deny the agreement to measure or that the ground has been measured in accordance with any agreement, and that the number of loads is as alleged, and they say that they have always been ready and willing to work down this ground and account to the Rose Innes Company. I need state the pleadings no further. Under their Trust Deed the directors of these Companies might at any time and upon such terms as they might think fit *provisionally* entertain such proposals to amalgamate their Companies with any other Companies established for similar purposes, and the directors could make proposals for that purpose *provisionally*, and such proposals when definitely arranged must (according to the Trust Deed) be submitted to a special general meeting of shareholders, and such general meeting has power to take into consideration such proposals, and *conclude any final arrangement* for amalgamation, purchase or acquisition, *or authorise the directors to arrange the details thereof*. In the case before us proposals were made provisionally, by the directors of the Central Company, as we know from the letter of the 28th June, and certain terms were submitted as a basis of negotiations. On the 25th July, 1883, the defendant Company's shareholders resolved to accept the offer of the Central Company "in terms of that Company's letter of the 28th June, 1883," and authorised their directors to *complete the amalgamation* of the Company's claims, with the sale of high ground, but the resolution did not empower the directors to vary the terms of the agreement or to settle the terms of amalgamation. In the same way the shareholders of the Central Company approved the action of their directors, who had made the offer to the Rose Innes Company on the basis agreed to by the shareholders of the plaintiff Company, and resolved "that their directors be empowered *to carry the same into effect* at as early a date as convenient." On the 1st August, therefore, there was a consent to certain defined terms of amalgamation by both Companies, and that which was at first a mere basis of negotiations became a contract to amalgamate on certain terms. By the resolutions passed the directors do not appear to have been authorised to vary the terms in any way, nor were they

authorised, as is alleged in the plea, "to conclude the negotiations and settle the details of amalgamation." Under these circumstances it appears to me that the agreement made at the time of the amalgamation being carried out was *ultra vires*, and therefore cannot stand. The defendants' plea setting up this agreement must therefore fail. Can, then, that which was done within the powers of the directors hold good? There appears to be no good reason why it should not. In accordance with the terms of the letter of the 28th June, the plaintiff Company are entitled to the payment of 5s. per load of 16 cubic feet, from the amalgamated Company, for all ground above the level of 100 feet, measured downwards from the level of the top of the hard rock, facing road 6, north. Any balance between liabilities and assets over Mining Board paper is to be deducted from the payment to be made on account of high ground. The Court has now to determine whether there is sufficient proof of the extent of measurement of the high blue ground, and for myself I think the Court has sufficient data upon which to rest its judgment in the survey of Mr. Tucker, now in evidence. Allowing for all possible errors in this measurement, I concur in thinking that judgment should be for the plaintiff for £20,000, with costs.

1884.
July 28.
" 29.
" 30.
Oct. 10.

Rose Innes
D. M. Co., Ltd.,
vs. Central D. M.
Co., Ltd.

[Plaintiffs' Attorney, RHODES.
Defendants' Attorneys, STOW & CALDECOTT.]

LONDON AND SOUTH AFRICAN EXPLORATION COMPANY, LIMITED, vs. DUTOITSPAN MINING BOARD.

Act 19, 1883, §§ 43, 51, 78, 81.—*Assessment of claim property.—Powers of Mining Board.—Mandamus.*

An application for a mandamus to compel a Mining Board to remove from the assessment roll of the Mine certain property belonging to the applicants, the owners of the soil, which they alleged had been improperly assessed as "claim property," was refused, the Court holding that the matters in issue between the parties could not be satisfactorily determined on motion.

1884.
 July 29.
 " 30.
 —
 L. & S. A.
 Exploration Co.
 Ltd., vs.
 Dutoitspan
 Mining Board.

This was a motion for a *mandamus* on the defendant Board to remove from the assessment roll of the Dutoitspan Mine a certain portion of the mine belonging to the applicant Company, which portion the applicants alleged had been wrongfully included in the assessment roll.

The affidavit of Mr. J. B. Currey, manager of the applicant Company, set forth that on December 3, 1883, the respondent Board framed an assessment roll of claims liable to assessment in the said mine in terms of the provisions of Act 19 of 1883, and that thereafter the said Board levied certain rates upon the assessed value; that on inspection of the assessment roll he had ascertained that certain portions of the estate of the applicant Company, not being claims, had been placed on the said roll, and assessed under the description and designation of claims; that a correspondence had ensued between the applicant Company and respondent Board, in which the former contended that they owned no claims properly so called in the mine and the latter disputed that position. He further said that there were no such claims as those now in dispute upon the official register of the mine, and that the applicant Company was likely to suffer damage to its credit if their said property were not removed from the assessment roll. There was a further affidavit of Mr. Currey, in his capacity as Registrar of Claims in Dutoitspan Mine, in which he deposed that the claims to which the notice of motion referred were not registered in the name of the applicant Company in the Register of Claims. In reply, the affidavit of Captain Yonge, Chairman of the respondent Board, alleged that the claims in question (or portions of the estate in question) were situated within the limits of the said mine, and that in the year 1881, when the deponent was Registrar of Claims, they were upon the Register of the mine, but that in that year Mr. Kilgour, the manager of the applicant Company, whom Mr. Currey had succeeded, was appointed Registrar of Claims. The deponent attached to his affidavit an advertisement taken from a local paper, published on the day on which he made his affidavit, wherein it appeared that the applicant Company had offered the lease of the said portions of the mine for sale, describing the plots by the claim

numbers used in the mine and in the assessment roll (the advertisement was headed "Sale of ground in Dutoitspan Mine.")

1884.
July 29.
" 30.

L. & S. A.
Exploration Co.,
Ltd., vs.
Dutoitspan
Mining Board.

Hoskyns, C. P. (with him *Forster*), for the applicants, contended that they were entitled to come to the Court for a *mandamus*, as it was very prejudicial to them to appear upon the roll as liable to rates. A claim, he contended, was a right to dig granted by the landlord to some one else. Therefore, unless the Act of Parliament had forced that position upon him, the landlord could not possess a "claim," which meant a "claim" in another's land. Sect. 81 of Act 19 of 1883, as regards the definition of a claim, is in the following terms:—"Save all existing rights, the word 'claim' shall be taken to mean any portion of ground assigned for mining purposes, of a size to be from time to time proclaimed by the Governor." Unless the ground be shewn to have been actually assigned for mining purposes at the time of the assessment it was not a "claim." The Act was stringent enough against the proprietors of the land, and they should be protected in every possible way that the strict wording of the Act would permit. The portions of ground in question were not abandoned claims. They were once on the Register and are now lying vacant, and therefore they were in the same condition legally as virgin soil. [BUCHANAN, J.P.:—Ought not some fuller description to have been given of the ground in question? The question of the landlord's liability was fully discussed in the case of *Griqualand West Company vs. L. & S. A. Exploration Co.* in the Court of Appeal (1 Buch. C. A. 239). Since that case, however, the present Act 19 of 1883 has been passed.] By virtue of sect. 78 of the Act, the proprietors would, in certain circumstances, be forced to become claimholders; but that section does not govern the present case, in which we contend that these claims, not being on the Register, *ipso facto* revert as portion of their farm to the landlord. [BUCHANAN, J.P.:—Should you not have gone further and stated that this ground had not been "assigned for mining purposes?" JONES, J.:—Have any steps been taken by the Board under sect. 78? The respondents are in a dilemma. If they have taken the proper steps under sect. 78, and the proper times have elapsed, then,

1884.
July 29.
" 30.

L. & S. A.
Exploration Co.,
Id., vs.
Outoitspan
Mining Board.

the applicants not having undertaken the liabilities mentioned in the section, the respondents are themselves the holders of the claims in question; but if they have not moved under that section, then they have not forced the applicant Company into the position of a claimholder. [BUCHANAN, J.P.:—Under what section of the Act was the assessment made?] Under sect. 43. The claims therein intended must be actual not potential claims. Sect. 51 refers to the levying of rates on claims in the mine. These rates are levied by the Mining Board, and it would be monstrous that the landlord should be taxed by a Board in the election of which he had had no voice. The landlord is in a most difficult position, and it is the object of the Mining Board to burden him in every way. He may possibly be forced to keep his claims safe, but that would have to be by an action brought for that purpose. [BUCHANAN, J.P.:—That point was argued in the Court of Appeal. Whatever may be the landlord's position as regards virgin soil, what is his position when he takes over a claim once worked?] The Legislature evidently thought that the common law was not sufficient, and accordingly sect. 78 of the Act defines his position. But it does not matter whether these are virgin claims or not. As soon as the servitude is abandoned the ground reverts to the landlord unencumbered; it is no longer a "claim," and the landlord cannot be held liable as though the servitude still existed. [BUCHANAN, J.P.:—Is your proper remedy by motion? The assessment took place in December, 1883, since then there has been correspondence, and it is now near the end of July 1884. Should you not have instituted an action?] It is submitted that we have a remedy by motion. The Company will be damaged if it is found it can be rated. The manager's affidavit shews apprehension of irreparable loss. [JONES, J.:—The hardship is not great. The landlord holds the soil, but he has granted a certain servitude. If then the servitude is surrendered, and he gets his property unburdened, ought not the liabilities to follow? Suppose he worked the claims, would he not be liable to rates?] The articles of association prevent the applicant Company from mining. [BUCHANAN, J.P.:—The Company has the farm. A portion thereof is subdivided into claims. Suppose

the claim were worked down 100 feet, and the nature of the ground were thus changed. If the claim is then surrendered to the landlord does he not become saddled with the responsibilities?] That is arguable. He might possibly have to keep his claim safe. [BUCHANAN, J.P.:—You might possibly have a strong position in an action.] As to the advertisement, it is headed “Sale of *ground* in Dutoitspan Mine,” which means that there is a portion of ground which the landlord wishes to assign for mining purposes. The numbers describing the portions of ground only shew that there is soil which could be assigned for mining purposes, and are used for convenient reference by comparison with the published map of the mine, which is divided into portions numbered in a particular way. The applicants have no objection to being put upon terms to bring their action if necessary.

Lord, Q.C. (with him *Hopley*), for the respondents, contended that this was not a matter which could be decided on motion, and that no damage had been shewn by the applicants. [JONES, J.:—You assess unregistered property as claims.] We assess because the ground is in the mine, and it is rateable property in the mine. [JONES, J.:—They may have been claims once and be now quite worthless.] The advertisement shews that is not the case. The Board is not at present levying any rate, and the Court is asked to remove from the assessment roll property which may, in a few days time, if the applicant Company is successful in selling it, have an owner who can work it, and then the Board could not assess it. On that ground alone the motion should be refused. Moreover, this is “claim property.” It belongs at present to the applicant Company, but on the 14th August they may have sold, as their advertisement shews an intention to sell, to various purchasers, who will then become liable under the assessment. Again they may be abandoned claims, and then sect. 78 of the Act may be put in force, and the applicant Company will, if they do not surrender the property to the Board, become liable to rates upon the basis of the assessment. [BUCHANAN, J.P.:—Why not proceed under the 78th section?] That section is not compulsory and it is very stringent. In the face of the

1884.
July 29.
“ 30.
—
L. & S. A.
Exploration Co.,
Ltd., vs.
Dutoitspan
Mining Board.

684.
 July 29.
 " 30.
 —
 L. & S. A.
 Exploration Co.,
 Ltd., vs.
 Dutoitspan
 Mining Board.

advertisement of the intended sale by the applicant Company the Board would have been wrong to have attempted to put the section in force. This is claim property in the mine, and therefore liable to be assessed as laid down by the Act. When Captain Yonge ceased to be the Registrar of Claims these claims were in the Register. His successors in that office have been Mr. Kilgour and Mr. Currey, both managers of the applicant Company. They knew the full history of these claims from the Register, and have removed them from it for their own purposes. The claims ought to be on the Register, there is nothing giving the Registrar power to strike them off, and he may be compelled by an application to this Court to restore them. This was not a case for an interdict. If the Board brought an action for the rates upon the present assessment, the applicants could resist and defend the action. At present however the Board had only assessed, as the Act empowered them to do, and as it was their bounden duty to do. A great many points were involved, and the Court would prejudice the position of respondents by an order at present.

Hopley (on the same side) pointed out that the Mining Board could not initiate proceedings under the 78th section. He also argued that the ground had been assigned for mining purposes, as it was included in the proclaimed area of the Dutoitspan Mine.

Hoskyns, C. P., replied.

Cur. adv. vult.

Postea (July 30),—

BUCHANAN, J.P., after referring to the nature of the motion, proceeded to say that the respondents had the right to assess the claim property in the mine, and the first question the Court had to decide in dealing with the matter was whether the property in question was "claim" property. Claims are defined by sect. 81 of Act 19 of 1883 as portions of ground assigned for mining purposes. Has the property now sought to be removed from the assessment roll been so assigned? It once appeared in the mine and on the Register as claims. This was the case in Captain Yonge's

time, and the Court does not know by what means they were removed, nor does the Court know whether they were ever abandoned. The applicants have had ample opportunity of bringing an action but have not done so; now, just before an advertised sale of this very property, they proceed on motion. The Court has not been informed what kind of claims these are, whether they are virgin soil, or have been worked and then abandoned, or whether they have been abandoned at all. Accordingly the Court experiences a difficulty in deciding the matter on motion. The applicants have based one of their main arguments on the depreciation of their shares if the relief prayed for is not granted, but they have not shewn to the satisfaction of the Court that this will be the result. On the other hand, the Court is in the dark as to why the respondents have not availed themselves of the strong remedies which they have under sect. 78 of the Act. The Court is of opinion that there are too many important points involved for the matter to be decided save by an action, and the application must therefore be refused, with costs.

JONES, J., concurred.

[Applicants' Attorneys, STOW & CALDECOTT.
Respondents' Attorney, D. J. HAARHOFF.]

1884.
July 29.
" 30.
—
L. & S. A.
Exploration Co.
Ltd., vs.
Dutoitspan
Mining Board.

FENTON vs. BOYLE & Co.

Collusive sale and delivery.—Husband and wife.—Interpleader.—Fraud.

Where a debtor against whom two judgments had been obtained, and under one of them a writ of attachment placed upon certain movable property, entered into a deed of sale, with another creditor, of all his movable property, and the creditor received the keys of the premises, and thereupon handed them to the debtor's wife, and placed her in possession as manageress at a salary, for the purpose of carrying on the business in precisely the same manner as before:—Held, on appeal, that there had been no genuine

delivery by the debtor to the creditor, and that the transaction, as against a subsequent attachment by a judgment creditor, must be set aside as fraudulent.

1884.
Aug. 22.
—
Fenton vs.
Boyle & Co.

This was an appeal from a judgment of the Assistant Resident Magistrate of Kimberley, in an action in which Frank Boyle & Co. and R. Fenton were summoned, under sect. 58 of schedule B to Act 20, 1856, to have it determined whether certain movable property, attached under a judgment obtained by Fenton, and claimed by F. Boyle & Co., was the property of the latter or not. From the evidence taken in the Magistrate's Court it appeared that, on June 25, 1884, one A. Rowley, by a deed of sale, sold to F. Boyle & Co. the stock, furniture and effects of the "Oriental Bodega," being all the movable property he was at that time possessed of, for £113 6s. 6d., for which sum he was indebted to Frank Boyle & Co., for goods previously sold and delivered. F. Boyle & Co.'s manager went to the premises and there was a formal handing over of possession on the morning of the same day, and immediately after Mrs. Rowley was left in possession, as manageress, at a salary of £3 a week, with her husband's consent. The keys were handed by Rowley to Boyle & Co.'s manager, who handed them to Mrs. Rowley, and she immediately unlocked and opened the premises. At the time of the sale there was an attachment upon the property obtained by one Dallamore, which was subsequently taken off, and the judgment satisfied by Rowley. On the previous day, June 24, Fenton had recovered judgment for £7 2s. and costs amounting to £1 16s. against Rowley, and he took out a writ of execution on the 5th July following, under which part of the above mentioned property was attached. Frank Boyle & Co. claimed the property under their deed of sale. It appeared that Boyle & Co. were unaware of Dallamore's attachment at the time the deed of sale was entered into, but Rowley was aware of it as, already mentioned, and subsequently satisfied the judgment.

The magistrate declared the property not executable, and ordered the original plaintiff, Fenton, to pay the costs, and from this judgment he now appealed.

Lord, Q.C., appeared for the appellant and was proceeding to argue that the facts shewed no real *bonâ fide* transaction, when

1884.
Aug. 22.
Fenton vs.
Boyle & Co.

THE COURT called upon,

Hoskyns, C. P., for the respondents, who contended that on the 25th June there was a delivery by Rowley to Boyle & Co. The fact that the latter placed Mrs. Rowley in possession, rather than any other person, did not disprove delivery. This was not a case of insolvency, and there was no question of undue preference. At any rate, in a case of this kind, the messenger was not to judge, but that point was not now before the Court; of the creditors whose names were before the Court, Dallamore had been paid, and Fenton was secured; *Rens vs. Bam's Trustee*, 2 Menz. 89; *Long vs. Randall*, 1 Buch. E.D.C. 62; *Brown vs. Messenger of the R. M. Court, Queenstown*, Buch. 1876, 49; *Lexn's Trustee vs. Cerutti*, Buch. 1869, 313. In all these cases judgment went on the question of delivery, and clearly here there was a delivery by Rowley to Boyle & Co.

Lord, Q.C., in reply:—The transaction was not a *bonâ fide* one, and there was in fact no delivery. The whole transaction was suspicious; Rowley sold all his property to Boyle & Co., who immediately placed Mrs. Rowley in possession. If there was a delivery, why did Boyle & Co. allow Dallamore's writ to be executed and remain in force till July 9th? The transaction was a colourable one, and the fact that the goods were not removed, or intended to be removed, shewed it: *Twyne's case*, 1 Sm. L. C. p. 1, and *Wordall vs. Smith*, therein cited, and 1 Camp. 333; *Long vs. Randall*, *ubi sup.* The possession of Mrs. Rowley was nothing but the possession of Rowley himself.

BUCHANAN, J.P.:—I am of opinion that the Magistrate was wrong in the judgment given in the interpleader suit. The case of *Long vs. Randall* is in point; the judgment in that case was based on the fact that there was no delivery. (His Lordship then went at length into the facts of the case and proceeded):—The question is, has there ever been a legal *bonâ fide* delivery to Boyle & Co.? The transaction

1884.
Aug. 22.
Fenton vs.
Boyle & Co.

appears to me to be colourable. All the property was passed to avoid the judgment debtor. Rowley was in difficulties, and hence this transaction was entered into to protect him, to defeat his creditors, or to assist Boyle & Co. No action was taken by Boyle & Co. until July 9. I have come to the conclusion that the property was never really out of Rowley's possession, and that the appeal must therefore be allowed.

JONES, J.:—I quite concur. This is one of those transactions which I regret to say are too commonly resorted to by judgment debtors in this district. In order to avoid the legitimate execution of the writs of judgment creditors, a form of sale and delivery is gone through, in order that when the messenger appears the property may be said to belong to some one else. There has been no real *bonâ fide* sale and delivery; and the whole transaction can only be viewed as an attempted fraud upon creditors, and the sale as merely fictitious.

The appeal was therefore allowed, with costs.

[Appellant's Attorney, BEEVOR.
Respondents' Attorney, D. J. HAARHOFF.]

MAGISTRATES' CASES REVIEWED.

QUEEN vs. JACOB.

Ordinance 24, 1847, §§ 1, 10.—Gaol regulations.

A prisoner who has committed an assault on a convict guard should be charged with contravening sect. 10 of Ordinance 24 of 1847. Before such prisoner can be sentenced to lashes it is necessary to prove that he was undergoing a hard labour sentence at the time of the offence.

LAURENCE, J.:—This case comes in review from the Resident Magistrate of the District of Herbert, before whom, on April 29, the prisoner was charged with “contravening the gaol regulations promulgated by H.E. the Governor in terms of sect. 1 of Ordinance 24 of 1847,” by assaulting a convict guard. The prisoner was a convict in the Douglas Gaol. He pleaded “not guilty” to this charge, but was convicted and sentenced to receive 25 lashes. It is difficult to understand why the prisoner was not charged under sect. 10 of the Ordinance, which expressly provides for offences of this description; I am not aware, and have no ready means of ascertaining, under what Regulations the Magistrate proceeded; but in any case Regulations under sect. 1 could not be inconsistent with the provisions of the Ordinance itself, which provides that only such convicts as are undergoing sentences of hard labour shall be liable to lashes for offences against prison discipline. The Magistrate in this case, as in several others which have recently been before me from other Magistrates, omitted to take any evidence that the prisoner was undergoing such a sentence. I should be glad if the *Crown Prosecutor* would consider the case.

1884.
May 8.
„ 13.
Queen vs. Jacob.

1884.
May 8.
" 13.
Queen vs. Jacob.

Postea (May 13),—

Hoskyns, C. P., produced certain regulations for the Kimberley Gaol, which had been framed in 1882, but said there was nothing precisely applicable to the offence for which the prisoner had been tried. There was no doubt the Magistrate should have proceeded under sect. 10 of the Ordinance; and there was no positive evidence that the prisoner was under a hard labour sentence, and therefore liable to lashes.

Conviction quashed.

QUEEN vs. POLS.

Act 28, 1883, §§ 75, 94.—Payment to informers.

Where a prisoner has been convicted under sect. 75 of Act 28, 1883, of selling liquor without a licence, it is not competent for the Magistrate under sect. 94 to award payment of portion of the fine imposed to the traps engaged in obtaining the conviction.

1884.
May 8.
" 13.
Queen vs. Pols.

LAURENCE, J.:—On May 2 a prisoner named Max Pols was charged before the Assistant Magistrate of Dutoitspan with contravening sect. 75 of Act 28, 1883, by selling liquor without a licence to two natives, who were traps employed by the police. He was convicted and sentenced to pay a fine of £20, or two months imprisonment with hard labour; and the evidence fully supported the conviction. On application made by the police inspector, who prosecuted, under section 94 of the Act, the Magistrate awarded the sum of £1 to each of the two native traps. The section provides that "the Court before which any offence against this Act shall be prosecuted may direct that any portion not exceeding one-half of any penalty imposed and recovered, shall be paid or awarded to any person who may have given such information as shall have led to the conviction of the offender." As I read this section, the intention of the legislature was that

these payments should be made to persons giving information leading to the conviction of offenders against the Act; but it was never intended that such payment should be made to traps employed by the police to induce a committal of the offence. If such a course is adopted, it may open the door to grave abuses, the rewards may be regarded as bribes, and a powerful temptation and incentive to give false evidence may be supplied. I should be glad if the *Crown Prosecutor* would consider whether in his opinion persons in the position of the traps employed in the present case are within the meaning of the section, or whether the order for these payments was not really *ultra vires*. Whether *ultra vires* or not, I think there can be little doubt of its inexpediency.

1884.
May 8.
" 13.
Queen vs. Pals.

Postea (May 13),—

Hoskyns, C. P., said he concurred in thinking that sect. 94 would not cover a grant of portions of the fines imposed to the traps employed.

THE COURT accordingly confirmed the conviction and sentence, but quashed the order for the payment to the traps.

QUEEN vs. RICHARDS.

Act 28, 1883, §§ 81, 82.—*Liability of licensee for acts of agent.—Proof of agency.—Mens rea.*

An order for the closing of certain licensed premises having been issued by a Magistrate, under sect. 81 of Act 28, 1883, S., a person then serving customers on the premises, disobeyed the order. R., the holder of the licence, in his capacity as trustee of an insolvent estate, was convicted of contravening sect. 82 of the Act. Held, that as there was no proof that the order had been served on R., or that S. was his agent, the conviction must be quashed.

1884.
May 19.
" 20.
Queen vs.
Richards.

JONES, J.:—George Richards who holds a licence, in his capacity as trustee of an insolvent estate, for certain premises in Thompson Street, Kimberley, was charged on May 6 before the Police Magistrate with contravening sect. 82 of Act 28, 1883, by disobeying an order for closing his licensed premises which had been made by the Resident Magistrate under the provisions of sect. 81. He pleaded "not guilty," but was convicted and fined £5 1s. Sect. 81 provides that "Where any riot or tumult occurs, or is expected to occur in any place, the Resident Magistrate, or any two justices of the peace, may order any or every licensed person in or near such place to close his premises during any time which such magistrate or justices may see fit." It appears that in this case the Magistrate had made an order for the closing of all licensed premises, and this order had been addressed not to the accused, but to the Commissioner of Police, who had enforced it by his officers. The order, however, did not allege that any riot or tumult had occurred or was expected to occur, and there is no evidence of such riot or tumult having happened, or being anticipated, in the present record. The record contains evidence that the Magistrate's order was transmitted to one Sweet, who was on the premises, serving "behind the counter," and who neglected to obey it; but there is no direct evidence that Sweet was in charge of the premises, or that he was acting as agent for the accused. I should be glad if the *Crown Prosecutor* would consider whether he is prepared to support the conviction.

Postea (May 20),—

Hoskyns, C. P., argued in support of the conviction. As to the order being served on Sweet and not on the actual licensee, the latter might be away, and there might be sudden occasion for the closing of licensed houses. The person in charge was to all intents and purposes the agent of the licensee, and service on him was therefore sufficient; he contended there was sufficient evidence that Sweet was in charge and was authorised to act as he had done. If effect were not given to the presumption of agency in such

circumstances the provisions of the Act in this respect would be nugatory.

LAURENCE, J.:—Sweet could have been prosecuted for his own conduct. The Act renders liable “any person resisting or obstructing the execution of any such order,” and not merely the licensee. The question is whether in the present case there was any proof of agency. Under the former local Ordinance the licensee was rendered liable for the acts of any person on the premises until the contrary appeared; but under the present Act it would seem that agency must be proved.

Hoskyns, C. P.:—Sweet was selling liquor behind the bar, and when served with the order said he should keep open. He submitted there was sufficient proof of his agency to make Richards criminally liable for his acts. As to the other point, he argued that it was unnecessary to set forth that there was a riot or apprehension of riot. When the Magistrate issued an order it was to be presumed that he had acted properly, but if he had acted *ultra vires* an action would lie against him. His order could be properly issued through the Commissioner of Police; in the circumstances contemplated by the Act prompt action was required.

JONES, J., after referring to the facts of the case, said it was unnecessary to decide the other points which had been discussed, as the conviction must be quashed on the ground that there was no proof of service of the order for closing the premises upon the accused. The evidence shewed that Sweet and his wife were on the premises at the time, but there was nothing to shew in what capacity; in the absence of any proof of agency the conviction could not be sustained.

LAURENCE, J., concurred, and referred to the case of *Somerset vs. Hart*, reported as follows in *Weekly Notes*, March 29, 1884:—

“Case stated by Justices. On an information against the respondent, a licensed person, under the Licensing Act, 1872, sect. 17, for suffering

1884.
May 19.
“ 20.
—
Queen vs.
Richards.

1881.
May 19.
" 20.
—
Queen vs.
Richards.

gaming on the premises, it appeared that gaming had taken place in a room on the premises with the knowledge of the potman employed by the respondent. It did not appear that the potman was in charge of the premises. The Magistrates found that there was no evidence that the respondent had any actual knowledge that the gaming was going on or that he had willingly shut his eyes to it, and they decided that the knowledge of the potman was not constructively the knowledge of the respondent and therefore dismissed the information.

"THE COURT (LORD COLERIDGE, C.J. and CAVE, J.) held that the potman not appearing to have been in charge of the premises, and there being no evidence of connivance on the part of the respondent, the Magistrates were right in not convicting."

The present case (his Lordship continued) in my opinion falls within the principle of that decision. The licensee cannot be held criminally liable unless agency is proved, or may fairly be presumed from the facts of the case; and in the absence of such proof this conviction ought to be quashed.

Conviction and sentence quashed accordingly.

QUEEN vs. MICHELL.

Ordinance 24, 1847, §§ 10–12.—Act 5, 1866–7, § 3.—

Ordinance 5, 1876, Griqualand West, § 13.

An unconvicted prisoner cannot be sentenced to lashes for attempting to escape from gaol.

1884.
May 19.
—
Queen vs.
Michell.

JONES, J.:—A case has come before me in review from the Resident Magistrate of Hay in which a prisoner named Michell was charged with contravening sect. 12 of Ordinance 24, 1847, by attempting to escape from gaol. He pleaded guilty, and was sentenced to six months imprisonment with hard labour and to receive 25 lashes. The prisoner had been apprehended while drunk, and before he could be brought before the Magistrate had made a very determined attempt to break out of gaol. As at this time he was not under any sentence of hard labour, the lashes

were illegally imposed and must be struck out : Ordinance 24, 1847, sect. 10; Act 5, 1866–1867, sect. 3; Ordinance 5, 1876, Griqualand West, sect. 13.

1884.
May 19.
—
Queen vs.
Michell.

QUEEN vs. GONGA.

Act 28, 1883.—*Kafir beer.*

Where a prisoner was convicted of selling certain intoxicating liquor called “Kafir beer” without a licence, and the evidence was very conflicting as to whether the liquor sold was of an intoxicating nature, the conviction was quashed.

JONES, J.:—A prisoner named Gonga was charged on April 21 before the Assistant Magistrate of Dutoitspan with contravening sect. 75 of Act 28, 1883, by selling without a licence “certain intoxicating liquor commonly called Kafir beer;” he pleaded not guilty, but was convicted and sentenced. In this case the evidence was very conflicting. Several respectable witnesses were called for the defence, among them a native minister and the interpreter of the High Court, who swore that they were familiar with the various kinds of Kafir beer, and that the particular kind sold by the prisoner was non-intoxicant. On the other hand the evidence for the Crown was very weak. One of the native traps employed said, “I could drink a bucket-full of this beer without being drunk; before I finished the second bucket I should be drunk.” If the liquor sold was not intoxicating, it is clear that there was no contravention of the Act. As the evidence on this point is so conflicting, the prisoner was entitled to the benefit of the doubt, and the conviction must be quashed.

1884.
May 19.
—
Queen vs.
Gonga.

QUEEN vs. GRIESEL.

Act 17, 1867.—*False pretences.—Theft.*

Where a prisoner was convicted of stock-theft, and the evidence went to shew that he had released certain cattle, the property of his master, from a pound, by falsely representing that a certain heifer, which he left as security for the pound-money, was also his master's property; held, that the prisoner's conduct did not amount to a theft of the heifer.

1884.
June 16.

Queen vs. Griesel.

JONES, J.:—A case has come before me for review in which a prisoner named Griesel, *alias* Myburgh, was charged before the Resident Magistrate of Herbert with stock-theft, under Act 17 of 1867; he pleaded “not guilty,” but was convicted and sentenced to nine months imprisonment with hard labour. As my brother LAURENCE has pointed out to me, the trial purports to have been begun on April 20, which was *dies dominicus*, but it is unnecessary to consider the effect of this, as the conviction must be quashed on another ground. The prisoner, a herd, was sent to take his master's cattle out of the pound. He had no money and wanted to leave one of the oxen as security. On the pound-master objecting to the ox, the prisoner ultimately agreed to leave a heifer, which was then in the pound, but which did not belong to his master, and gave a written undertaking that this heifer should become the property of the pound-master if the other cattle were not duly redeemed. The case for the Crown was that the prisoner falsely represented that this heifer was his master's property, and he was accordingly convicted of stealing it from the owner. There was some evidence that the prisoner might have been under the *bonâ-fide* belief that the heifer did belong to his master; but in any case there was no taking or theft by him of the heifer, and the conviction and sentence must therefore be quashed.

QUEEN vs. JACK.

Act 18, 1873, § 7.

A prisoner convicted under sect. 7 of Act 18, 1873, cannot be sentenced to imprisonment with hard labour.

JONES, J.:—This case comes in review from the Special Justice of the Peace at Keiskamma, in the District of Barkly. The prisoner was charged with contravening clause 2 of sect. 7 of Act 18, 1873, by unlawfully absenting himself from his master's premises, or other place appointed for the performance of his work. The prisoner, who was employed in digging, pleaded "guilty," and was sentenced to pay a fine of 40s., or to be imprisoned for one month, with hard labour. The Act provides that any person contravening this section "may be fined any sum not exceeding £2, and in default of payment be sentenced to be imprisoned for any period not exceeding one month." Unfortunately it contains no provision for the imposition of hard labour; and that portion of the sentence must therefore be struck out.

1884.
June 16.
Queen vs. Jack.

LONDON :
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

KRM
9979
C36
R4

42

University of California
SOUTHERN REGIONAL LIBRARY FACILITY
405 Hilgard Avenue, Los Angeles, CA 90024-1388
Return this material to the library
from which it was borrowed.

RECEIVED
QL JAN 13 1997
NOV 08 1996



3 1205 01247 7657

UC SOUTHERN REGIONAL LIBRARY FACILITY



AA 000 106 455 9

